In The

Supreme Court of the United States

October Term, 1976

No. 76-547

HELEN H. SIMMONS,

Petitioner,

vs.

COUNCIL BLUFFS SAVINGS BANK, EXECUTOR OF THE ESTATE OF G. WILLIAM COULTHARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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INDEX

INDEX—Continued

TABLE OF AUTHORITIES

INDEX—Continued

STATUTES AND CONSTITUTION INVOLVED

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The Petitioner, Helen H. Simmons, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Iowa entered in this proceeding on June 30, 1976.

OPINION BELOW

The opinion of the Supreme Court of the State of Iowa is reported in 243 N. W. 2d 643 and printed as Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Iowa was entered on June 30, 1976. A timely petition for rehearing was denied *en banc* on July 26, 1976. This petition for writ of certiorari was filed within 90 days of July 26, 1976. This Court's jurisdiction is invoked under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED

1. Whether the Iowa Supreme Court's failure to rule on the timely-raised basic issue of the trial court's violation of Petitioner's federal civil and constitutional rights because the trial court lacked jurisdiction to cancel Petitioner's 1954 deed and Harrison County's 1938 tax deed, which deeds not only include the disputed land but also another 300 acres of riparian land and water owned by the Petitioner not the subject of this suit, constitutes State Action violating Petitioner's property rights under the Federal Civil Rights Act, 42 U. S. C. § 1983, denying her equal protection of the laws, and depriving her of property without due proc-

ess of law guaranteed by the Fourteenth Amendment to the United States Constitution. (For brevity, said State Action, etc., will be referred to as "State Action in deprivation of Petitioner's federal civil and constitutional rights" in the remainder of the "Questions Presented.")

2. Whether the Iowa Supreme Court's cancellation of Petitioner's 1954 deed, which includes approximately 300 acres of riparian land and water located in the California Bend not the subject of this suit, constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights. This 300 acre tract is the subject of the quiet title action *State of Iowa v. Harrison County, Clifford and Helen H. Simmons, et al.*, Harrison Co. Dist. Ct. (Eq. No. 21276), filed by the State in March, 1965, but never tried.

3. Whether the Iowa Supreme Court's destruction of Petitioner's record chain of title by cancelling Harrison County's 1938 tax deed to approximately 300 acres of riparian land and water located in the California Bend, which land is not the subject of this suit, constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights.

4. Whether the Iowa Supreme Court's finding, not supported by the evidence, that Respondent owns the disputed land by 15 years' adverse possession from 1952 to 1967 constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights. In October, 1959, the Chicago & Northwestern Railway Company issued Respondent a deed to an approximate 1000-acre tract bordering the disputed land on the east

and south. Respondent filed this action in February 1968, only eight years and four months later. The Code of Iowa, Section 614.1 (5) requires at least 10 years' adverse possession to divest a record title owner.

5. Whether the Iowa Supreme Court's failure to allow Petitioner the protection of Iowa's 10-year adverse possession statute, Section 614.1 (5), where Petitioner, when this suit was filed in 1968, had 14 years' adverse possession against Eliza Mencke, shown by the Record (Pl. Ex. 1) to be the Nebraska owner of the disputed land prior to the 1943 Iowa-Nebraska Boundary Compact (App. H), constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights.

6. Whether the Iowa Supreme Court's failure to rule on the timely-raised basic issue of Harrison County's 11 years' adverse possession of the disputed land against Eliza Mencke from 1943 to 1954, and the Court's denial of Petitioner's right under Iowa law to tack her adverse possession to that of the County, constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights.

7. Whether the Iowa Supreme Court's lack of jurisdiction to cancel Petitioner's 1954 deed to the disputed land because Respondent failed to file a statement in the County Recorder's office setting forth the details of his claim prior to filing this action, as required by Section 614.17, Code of Iowa (App. D), constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights.

8. Whether the Iowa Supreme Court's lack of jurisdiction to destroy Petitioner's record chain of title to the disputed land by cancelling Harrison County's 1938 Tax Deed because Respondent failed to bring this action prior to January 1, 1963, as required by Section 614.22, Code of Iowa (App. E), and because Respondent failed to pay all of the taxes due on the disputed land, as required by Section 448.7, Code of Iowa, constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights.

9. Whether the Iowa Supreme Court's finding that by his 1964 offer to purchase the disputed land plus other land (Def. Ex. 34), Respondent "simply sought to buy his peace to avoid litigation" with Petitioner constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights. This finding is not supported by the evidence. It is also contrary to Iowa case law holding that a Purchase Offer such as Respondent's recognizes Petitioner's record title to said land tolling the adverse possession statute of limitations, Section 614.1 (5), Code of Iowa.

10. Whether the Iowa Supreme Court's finding that Respondent could tack his adverse possession to the occupancy of the tenant of Respondent's grantor, the Chicago & Northwestern Railway Company, although the Railway Company expressly disclaimed any right, title or interest in the disputed land in its 1959 quiet title Petition in Paragraph X (App. F), and in Amendment to Petition (App. G), constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights.

11. Whether the Iowa Supreme Court's failure to rule on the timely-raised basic issue of allowing Respondent's 1969 deed from Ralph Mencke (conveyed 16 months after this suit was filed) to cloud Petitioner's title to the disputed land, plus other riparian lands she owns not the subject of this suit, constitutes State Action in deprivation of Petitioner's federal civil and constitutional rights.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1. U. S. C. A. Const. Amend. 14 § 1, p. 4. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. § 1983, Federal Civil Rights Act. 42 U. S. C. A. § 1983, p. 250. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Iowa-Nebraska Boundary Compact, Iowa Acts 1943, 50 G. A. CH. 306, Code of Iowa, Volume 1, p. lxiv. Set forth in Appendix H.

Section 448.7, Code of Iowa, Volume II, p. 2016. "No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title."

Section 614.1 (5), Code of Iowa, Volume II, p. 2911. "Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: (5) Those founded on written contracts, or on judgments of any courts except those provided for in the next subsection, and those brought for the recovery of real property, within ten years."

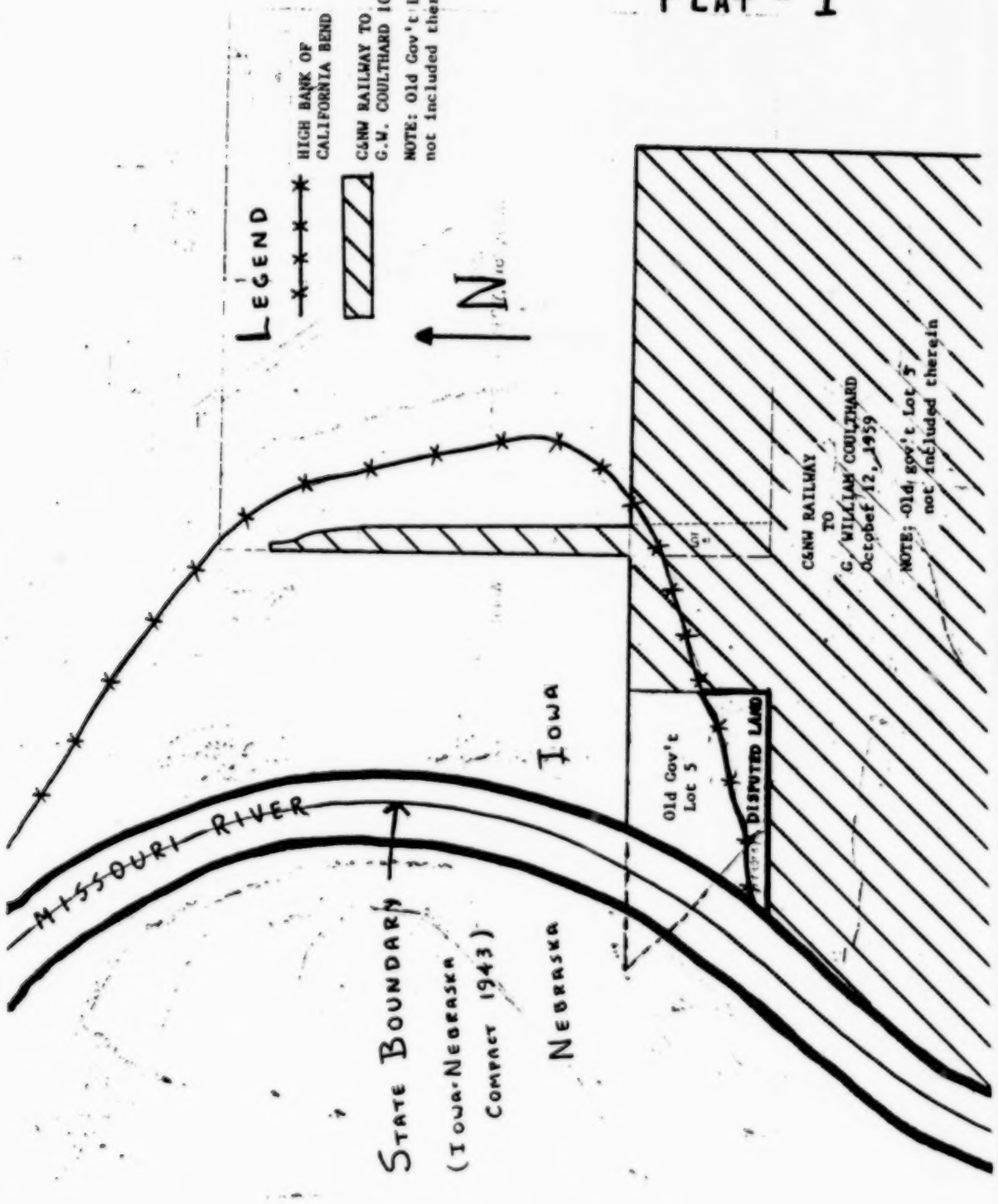
Section 614.17, Code of Iowa, Volume II, p. 2912. Set forth in Appendix D.

Section 614.22, Code of Iowa, Volume II, p. 2913. Set forth in Appendix E.

STATEMENT OF THE CASE

History of the Case (Procedurally)

On February 16, 1968, G. William Coulthard filed an action in the District Court of Harrison County, Iowa against Helen H. Simmons to quiet title to a 1,060 acre tract situated along the Iowa side of the Missouri River. (See plat 1, page 8.) Defendant Simmons did not dispute Coulthard's ownership of the major portion of this



tract, but she did claim ownership of the southern portion of Old Government Lot No. 5. (See "Disputed Land" plat 1, p. 8.) On October 22, 1971, the trial court entered its judgment and decree quieting title to the tract, including the disputed land, in favor of plaintiff Coulthard. From this decision defendant Simmons appealed to the Iowa Supreme Court, which court affirmed the trial court's decree, finding that Mr. Coulthard was the owner of the disputed land by adverse possession (App. A). Mrs. Simmons filed a timely petition for rehearing in the Iowa Supreme Court (App. B). Petition for rehearing was denied by the Iowa Supreme Court, *en banc,* on July 26, 1976 (App. C).

How the Federal Questions Sought to be Reviewed Were Raised

The federal questions arose from the trial court's lack of jurisdiction to cancel Petitioner's deeds to property not the subject of this suit. This violated the Petitioner's property rights under the Federal Civil Rights Act, 42 U. S. C. § 1983, and the due process and equal protection clauses of the Fourteenth Amendment.

The Iowa Supreme Court, trying this case *de novo,* did not rule on Petitioner's allegation of the trial court's deprivation of her federal civil and constitutional rights (App. A).

In her Appellant's Brief (pp. 3 and 40), Petitioner asserted in her assignment of error:

> "The Trial Court's denial of the Defendant's record title by ordering the cancellation of their Quit Claim Deed from Harrison County, Iowa, and its denial of their title by adverse possession to the disputed land,

constitutes State Action and violates the Defendant's rights under the United States Constitution, Amendment XIV, violates the Defendant's rights under the Constitution of the State of Iowa, Article I, and violates Defendant's rights under the Federal Civil Rights Act, 28 U. S. C. § 1343, 42 U. S. C. § 1983" (R. 170).

In her Petition for Rehearing (pp. 14 and 15) (App. B), Petitioner asserted:

"In addition to the disputed land, Defendant's 1954 deed from Harrison County also conveyed to her approximately 300 acres of riparian land along one mile of the Missouri River, a navigable stream under federal law. The said 300 acres of riparian land is not the subject of this suit, but *is* the subject of a quiet title action entitled *State of Iowa v. Harrison County, Clifford and Helen Simmons, et al.,* Harrison Co. Dist. Ct. (Eq. No. 21276) filed in March, 1965, but never tried. Blanket cancellation of Defendant's 1954 Deed will wipe out her vested record title to said 300 acres, and seriously cripple her long struggle to retain her ownership of said 300 acres against the claims of the State of Iowa. Clearly, such cancellation exceeds the lawful authority of the Court, and constitutes an unlawful deprivation of Defendant's property rights under the U. S. Constitution and under the Federal Civil Rights Act, 28 U. S. C. § 1343 and 42 U. S. C. § 1983."

History of Disputed Land

The disputed land comprises approximately twenty-five (25) acres located on the southern portion of Lot 5, Sec. 12, T78N, R46W of the 5th P. M. The disputed land is bounded on the north by the waters of the California Bend, on the east and south by land owned by Coulthard, and on the west by the Missouri River. (See plat 1, p. 8.) When perusing Plat 1, it should be pointed out that ail

land between the Missouri River and the high bank of the California Bend is low land. A portion of this low land, including the northern portion of Old Government Lot No. 5, is under water. The disputed land commands the entrance to all of this water in the California Bend from the Missouri River.

The pertinent dates, events and transactions leading to the development of this litigation follow:

1. In 1858, the Surveyor General completed the original United States Government Survey of the disputed land and the surrounding area. This survey established the Iowa subdivisional description used for all conveyances of land in the California Bend area (R. 4).

2. History shows that since the original survey, flood conditions caused continuous changes in the main stream of the Missouri River. Evidence presented to the trial court could not pinpoint where the main stream of the Missouri River flowed until the active flow of the river was rechanneled in 1938-1939 by the United States Corps of Engineers. This rechannelization restricted the main flow of the Missouri River to occupy only a portion of the area land. This channel is now known as the California Cutoff. The emerged land is known as the California Bend (R. 5).

3. On May 5, 1938, the Harrison County Treasurer issued a tax deed to Harrison County which included lands in Harrison County east of the California Cutoff pursuant to the Corps of Engineers rechannelization (R. 5).

4. In 1943, Iowa and Nebraska entered into a boundary compact (App. H). Under the compact the center

line of the California Cutoff became the boundary between the two states. Since the disputed land is east of the channel it came under the sovereignty and jurisdiction of the State of Iowa.

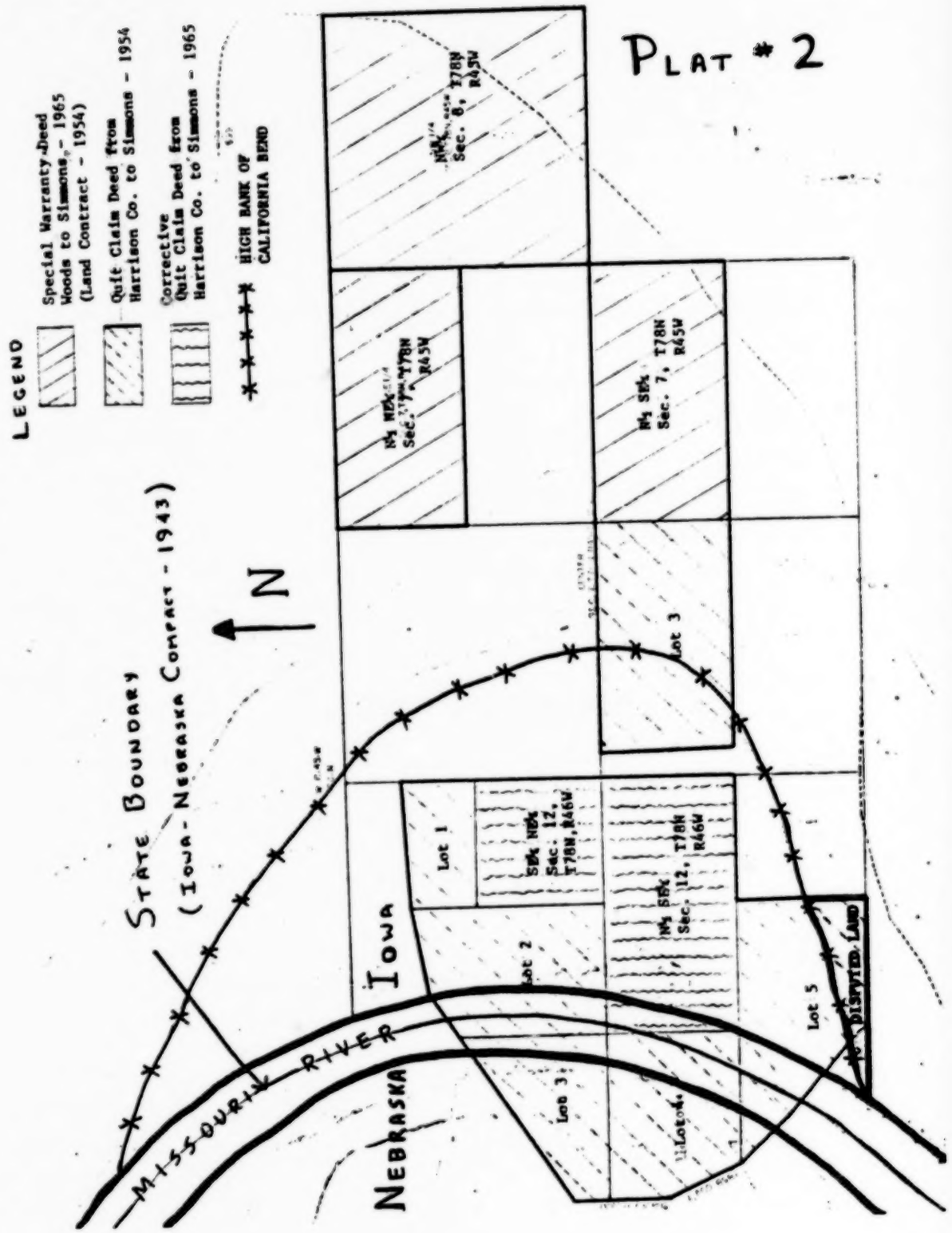
5. On March 4, 1948, the Harrison County Auditor filed an Affidavit of Possession stating that any person claiming any right, title or interest in Government Lots 1, 2, 3, 4 and 5 of Sec. 12, T78N, R46W, had one hundred twenty (120) days to set forth a claim (R. 51). On April 5, 1948, Ralph Mencke, a Nebraska riparian landowner, filed an Affidavit of Possession claiming title adverse to Harrison County. However, Mencke's affidavit contained Nebraska land descriptions (R. 51). Additionally, Mencke took no further action to enforce this claim and has never paid any taxes on this land.

6. In April, 1954, Simmons purchased three (3) parcels of land from Pace Woods. (See plat 2, p. 13.)

7. On September 22, 1954, Simmons purchased Lots 1, 2, 3, 4 and 5 from Harrison County, Iowa at a public sale of county owned land and was issued quitclaim deeds. The deeds were promptly and properly recorded. This purchase included the disputed land. (See plat 2, p. 13.) Simmons has paid all taxes assessed and levied against all of these lots, including the disputed land, from that date of purchase in 1954 to the present date.

8. On June 19, 1959, the Chicago & Northwestern Railway Company filed an action against Simmons, et. al., to quiet title to the same land the Railway Company subsequently conveyed to Coulthard on October 9, 1959. (See plat 1, p. 8.) On August 24, 1959, the Railway Company

PLAT #2



dismissed its action without prejudice to defendant Simmons. It is important to note that in Paragraph X (App. F) and Amendment to its petition (App. G), the Railway Company expressly disclaimed any right, title or interest to any of the disputed land and stated that Simmons was the owner of all real estate covered by her 1954 quitclaim deeds from Harrison County, including the disputed land (R. 103).

9. On October 9, 1959, Coulthard purchased land contiguous to the disputed land on the east and on the south from the Chicago & Northwestern Railway Company. Coulthard's quitclaim deed in both its metes and bounds description and its subdivisional description did *not* include the disputed land. (See plat 1, p. 8.)

10. During a four to six week period in the winter of 1961-62, the disputed land was cleared by Coulthard. Prior to this clearing, the disputed land was densely covered with cottonwood and willow trees. Thus, before the disputed land was cleared it was an unimproved, vacant lot, unfit for pasturing or farming and incapable of physical habitation.

11. On October 9, 1964, Coulthard sent a contract to record owner Simmons therein offering to purchase all of the land Simmons owned in the California Bend area as well as the land Simmons purchased from Woods. (See plat 2, p. 13.) Simmons refused the offer.

12. On March 24, 1965, the State of Iowa filed an action in Harrison County (Eq. No. 21276) claiming ownership of an ox-bow shaped area of land comprising 400-

500 acres in the California Bend. Simmons and Coulthard are the only remaining defendants. The perimeter of the land claimed follows the high bank of the California Bend and borders the Missouri River. (See plat 3, p. 16.) This case has not yet been tried.

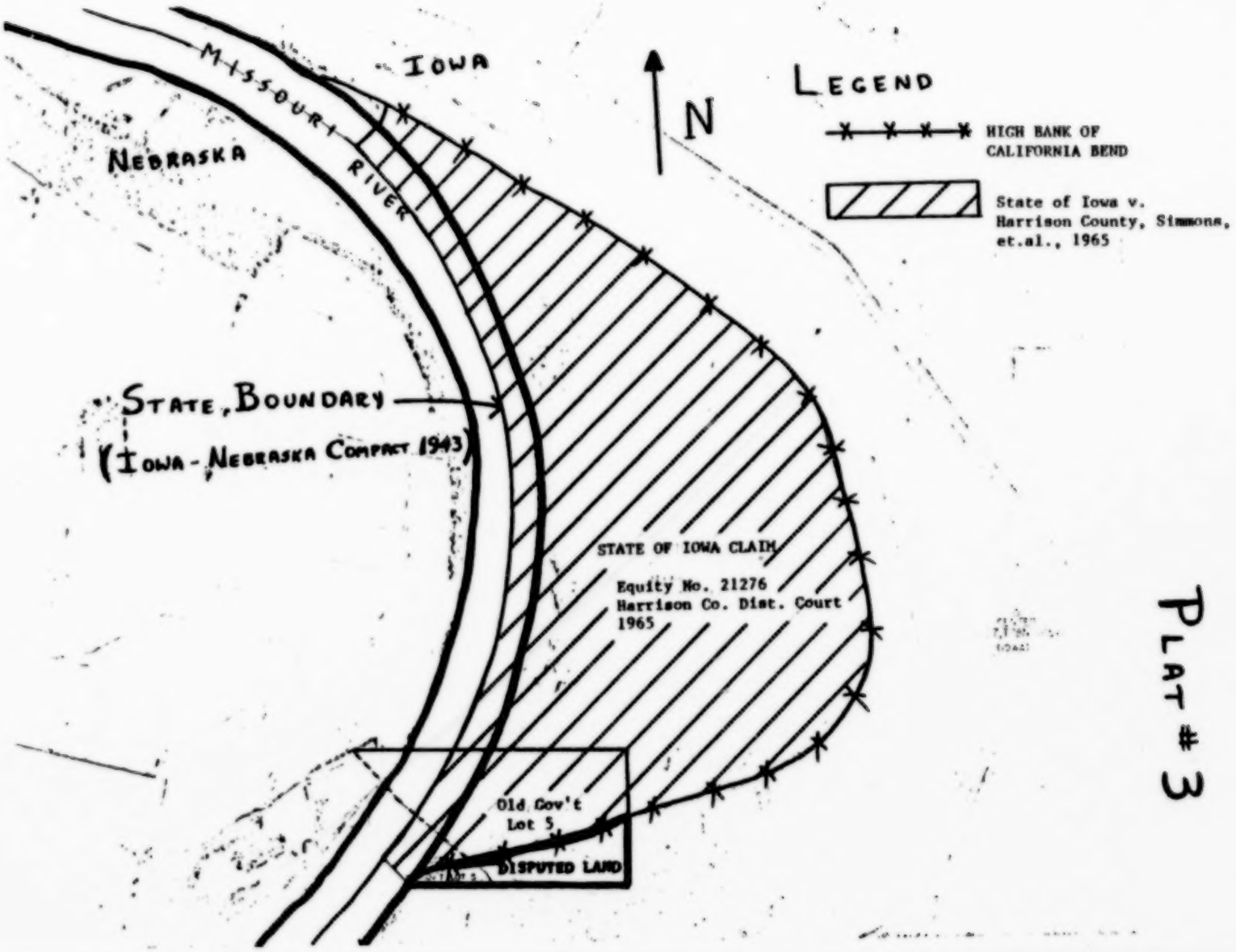
13. On April 5, 1965, Harrison County issued a corrective deed, conveying to Simmons the N½ of the SE¼ and the SE¼ of the NE¼ of Sec. 12, T78N, R46W of the 5th P. M. (See plat 2, p. 13.) This deed fulfilled the original intent of Harrison County officials to convey to Simmons all of the land Harrison County owned in the California Bend area in 1954.

14. On February 16, 1968, Coulthard filed this action in the District Court of Harrison County, Iowa to quiet title to a 1,060 acre tract, including the disputed land. (See plat 1, p. 8.) Subsequent to the trial court decree in favor of plaintiff Coulthard, defendant Simmons appealed to the Iowa Supreme Court. This case is now at bar.

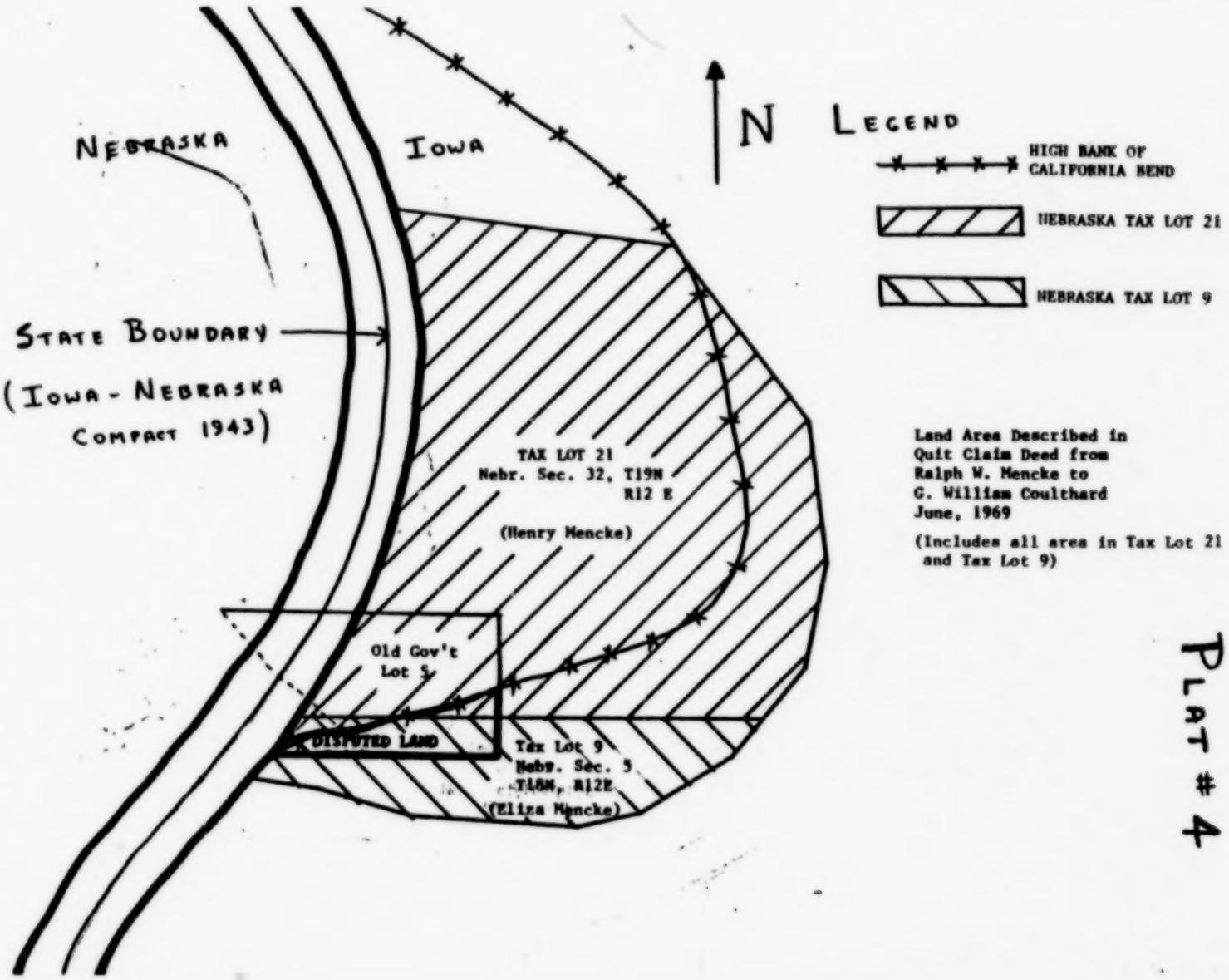
15. In June, 1969, sixteen months after he filed this suit, Coulthard obtained a quitclaim deed from Ralph Mencke. Although lands described in the deed are under the sovereignty of the State of Iowa, this deed purportedly conveys Nebraska Tax Lot 9 and Nebraska Tax Lot 21. (See plat 4, p. 17.) No evidence is in the record supporting Mencke's chain of title.

History of the Case (On the Merits)

Simply stated, Simmons claims title to the disputed land under two (2) separate theories:


IOWA
MISSOURI RIVER
NEBRASKA
N
LEGEND
HIGH BANK OF CALIFORNIA BEND
State of Iowa v. Harrison County, Simmons, et.al., 1965
STATE BOUNDARY
(IOWA - NEBRASKA COMPACT 1943)
STATE OF IOWA CLAIM
Equity No. 21276
Harrison Co. Dist. Court
1965
Old Gov't Lot 5
DISPUTED LAND

PLAT # 3


NEBRASKA
IOWA
N
LEGEND
HIGH BANK OF CALIFORNIA BEND
NEBRASKA TAX LOT 21
NEBRASKA TAX LOT 9
STATE BOUNDARY
(IOWA - NEBRASKA COMPACT 1943)
TAX LOT 21
Nebr. Sec. 32, T19N
R12 E
(Henry Mencke)
Old Gov't Lot 5
DISPUTED LAND
Tax Lot 9
Nebr. Sec. 5
T18N, R12E
(Eliza Mencke)
Land Area Described in Quit Claim Deed from Ralph W. Mencke to G. William Coulthard June, 1969
(Includes all area in Tax Lot 21 and Tax Lot 9)

PLAT # 4

1. It was conveyed to her in 1954 by quitclaim deed from Harrison County pursuant to a public sale of county owned land; and

2. She has title by adverse possession.

On the other hand, Coulthard claims the disputed land on three (3) grounds:

1. It was an accretion to the parcel conveyed to him by the 1959 deed from the Chicago & Northwestern Railway Company; and

2. It was conveyed to him by the 1969 quitclaim deed from Ralph Mencke; and

3. He has title by adverse possession.

Harrison County District Court Decision

The trial court held:

1. Coulthard owns the disputed land by the 1969 conveyance from Ralph W. Mencke.

2. Simmons' 1954 quitclaim deed from Harrison County was a nullity.

3. Coulthard owns the land by adverse possession.

The trial court further ordered and decreed that ". . . any and all instruments purporting to convey said lot (i. e., disputed land) are hereby cancelled and held for naught." (R. 171).

Iowa Supreme Court Decision (App. A)

On appeal, the Iowa Supreme Court determined that ". . . the decisive question is which of these claimants has established title by adverse possession. Although other

grounds are stated by both, we believe the parties must stand or fall on the strength of their conflicting adverse possession claims."

In affirming the trial court decision in favor of Coulthard, the court held that Coulthard's adverse possession spanned fifteen (15) years from 1952 to 1967. In computing this period, the court counted the occupancy of the Railway Company's tenant from 1952 to 1958 as inuring to Coulthard's benefit.

In discussing the bases on which Simmons claims the disputed land, the court found that Simmons' quitclaim deed from Harrison County was a nullity because during the years for which taxes were allegedly unpaid, the disputed land was located in Nebraska and was not subject to taxation by Harrison County.

The court also held that the Chicago & Northwestern Railway Company's acknowledgment of Simmons' ownership of the disputed land amounted to no more than an allegation Simmons claimed title.

The court dismissed Simmons' argument that Coulthard's 1964 purchase offer interrupted his adverse possession by declaring that Coulthard "simply sought to buy his peace to avoid litigation."

The court held that Iowa Code § 614.22 does not bar Coulthard's claim because Simmons was not in possession of the disputed land on July 4, 1961.

REASONS FOR GRANTING THE WRIT

1. The Iowa Supreme Court failed to address the issue of it jurisdiction over property not the subject of this suit. Therefore, so far as it purports to extinguish Simmons' interest in property over which the Court had no jurisdiction, the judgment of the Iowa Court cannot be sustained.

In this action, Coulthard sought to quiet title to a one thousand sixty (1,060) acre tract. Simmons only disputed Coulthard's ownership of the southern portion of old Government Lot No. 5. (See plat 1, p. 8.) However, the trial court cancelled both of Simmons' deeds from Harrison County in their entirety. Without modification, the Supreme Court affirmed. Simmons' deed from Harrison County included Lots 1, 2, 3, 4, and 5. Her corrective deed includes the SE¼ of the NE¼ and the N½ of the SE¼, Sec. 12, T78N, R46W of the 5th P. M. (See plat 2, p. 13.) Only the southern portion of Lot 5 was in dispute in this case. Thus, cancelling Simmons' entire deeds exceeded the subject matter jurisdiction of the Iowa courts.

The Iowa Supreme Court's affirmance of the trial court's decree cancelling "Simmons' record title to this land" is an arbitrary and capricious act. It gives a windfall of approximately three hundred (300) acres of Simmons' land to the State of Iowa and jeopardizes her defenses in the case *State of Iowa v. Harrison County, Simmons, et al.,* Harrison Co. Dist. Ct. (Eq. No. 21276) by destroying her record title to said land before this case has been tried.

Simmons' land claimed by the State of Iowa reemerged as a result of a second rechannelization of the

Missouri River in 1958 by the U. S. Corps of Engineers. Her rights are governed by the federal law of accretion and her ownership of the reemerged land is supported by this Court's decision in *Bonelli Cattle Company v. State of Arizona,* 414 U. S. 313 (1973).

Clearly, the blanket cancellation of Simmons' deeds to land not the subject of this suit exceeds the jurisdiction of the Iowa Supreme Court which constitutes state action violating Petitioner's property rights under the Federal Civil Rights Act, 42 U. S. C. § 1983, denying her equal protection of the laws, and depriving her of property without due process of law guaranteed by the 14th Amendment to the United States Constitution.

Thus, the Iowa Supreme Court decision conflicts with a host of decisions decided by this Court, including *Hanson v. Denckla,* 357 U. S. 235, 250 (1958).

2. The decision of the Iowa Supreme Court conspicuously conflicts with applicable decisions of this Court by evading constitutional issues properly and timely raised by Simmons. Additionally, the lower court's decisions are so shockingly wrong and so totally devoid of evidentiary support they present substantial due process questions.

This Court has stated, "It is the duty of this Court to review and correct plain errors of state courts which deny asserted federal rights upon a basis of fact which has no support in the record." *Postal Telegraph-Cable Co. v. Newport,* 247 U. S. 464, 473 (1918). It is well settled that a state court may not avoid deciding federal questions and

thus defeat the jurisdiction of this Court by putting forward non-federal grounds of decision which are without any fair or substantial support. *See, Wolfe v. North Carolina,* 364 U. S. 177, 185 (1960). If a case between private parties is arbitrarily and capriciously decided in violation of federal principles of law and contrary to undisputed facts, though the Court so deciding had jurisdiction over the suit, the judgment may be in violation of the Fourteenth Amendment. *William v. Tooke,* 108 Fed. 2d 758 (1940).

The Iowa Supreme Court determined that ". . . the decisive question is which of these claimants has established title by adverse possession." The Iowa Court decided this issue in favor of Coulthard. However, the facts do not support this finding.

Coulthard received a deed from the Chicago and Northwestern Railway Company for real estate contiguous to the disputed land on the east and on the south in November, 1959. (See plat 1, p. 8.) Coulthard filed this action in February, 1968. Thus, the total period Coulthard could claim regarding his alleged adverse possession was less than eight and one-half (8½) years. Iowa law requires ten (10) years adverse possession to divest a record owner.

The Iowa Court counted the alleged occupancy of one Maurice Cleaver, tenant of the Railway Company (Coulthard's grantor), as inuring to Coulthard's benefit. However, the evidence is conclusive that the Railway Company never intended to adversely possess the disputed land. In fact, the Railway Company expressly disclaimed any right, title or interest in this property (App. F & G).

Additionally, Coulthard interrupted any alleged adverse possession in 1964 by offering to purchase the disputed land. *Litchfield v. Sewell,* 97 Iowa 247, 66 N. W. 104, 106 (1896). Although the Iowa Court held that "plaintiff simply sought to buy his peace to avoid litigation," this cliche is not supported by the evidence. Coulthard's purchase offer to Simmons included all land owned by Simmons shown in plat No. 2, p. 13. If Coulthard was seeking to avoid litigation, it is sensible to conclude his purchase offer would have only included the disputed land. Furthermore, at the time of Coulthard's purchase offer in 1964, no impending litigation existed. Finally, Coulthard eventually filed this action, not Simmons.

Intent is a necessary element of adverse possession under Iowa law. Coulthard's testimony conclusively proves that he did not have the necessary intent to adversely claim the disputed land: "I didn't know what government Lot 5 was or where it was as I had no plat book. . . . I have learned since we commenced this (suit) that the Chicago Northwestern, my predecessor in title, had disclaimed any ownership in government Lot 5 in the quiet title action." (R. 89).

3. Coulthard had no standing to attack Harrison County's tax deed or Simmons' quitclaim deed. Therefore, the Iowa Supreme Court did not have subject matter jurisdiction over the property in dispute. A judgment rendered without jurisdiction of the subject matter is void. It is incumbent upon this Court to rectify this void judgment.

Section 614.22, part of Iowa's Marketable Title Act (App. D) provides that, ". . . no action shall be maintained to . . . cancel . . . a tax deed which has been recorded . . . prior to January 1, 1950 . . . if no such action has been commenced prior to January 1, 1963, the tax deed is conclusively presumed to be valid and unimpeachable and effective to convey title without exception . . . provided those claiming title under such deed are in possession on July 4, 1961."

The Iowa Court found that Simmons was not in possession of the disputed land on July 4, 1961. Therefore, it held Coulthard was not barred by § 614.22 to cancel Harrison County's tax deed, although his action was filed five (5) years after the § 614.22 Statute of Limitations had expired on January 1, 1963.

On July 4, 1961, the disputed property was wild timberland. At this time no one could claim physical occupancy. However, Simmons held constructive possession under her recorded deed. Therefore, she is entitled to all presumptions accorded Iowa record titleholders. "The law presumes possession of land is under regular title." *Moffitt v. Future Assurance Assn., Inc.*, 140 N. W. 2d 108 (Iowa 1966).

The Iowa Supreme Court decision denying Mrs. Simmons the protection afforded by § 614.22 denies her equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

The Iowa Supreme Court's finding that the Harrison County's tax deed was a nullity because the land described was in Nebraska and therefore not subject to taxation in Iowa is ill-founded. The Iowa and Nebraska Boundary

Compact in 1943 provided that beginning in 1944 taxes were to be paid in the State of Iowa. Also, Harrison County gave public notice of its adverse claim by the filing of its Affidavit of Possession on March 4, 1948.

In the alternative, Harrison County had authority to exempt the property from taxation and claim adverse possession for itself. This is what actually transpired. After filing the Affidavit of Possession in 1948, Harrison County's adverse possession related back to the 1943 Iowa-Nebraska compact. As Harrison County's grantee, Simmons can legally tack her twenty-two (22) years adverse possession to Harrison County's, giving her a total of thirty-three (33) years of adverse possession of the disputed land.

Section 448.7, Code of Iowa provides: "No person shall be permitted to question the title acquired by a treasurer's deed (tax deed) without first showing that he . . . had title to the property at the time of the sale . . . and that all taxes due upon the property have been paid by such person."

This statute was interpreted in *Maxwell v. Palmer,* 35 N. W. 659 (Iowa 1887): "Under this provision of the Code (Section 448.7), a plaintiff is not entitled to maintain an action to set aside tax deeds unless he has paid all the taxes due on the property, even though he claims that the tax deeds are void. . . ."

Coulthard has never paid any taxes on the disputed land. Therefore, he is not entitled to maintain an action to set aside Harrison County's tax deed. Since Coulthard had no standing, the courts below had no jurisdiction.

4. The decision below raises significant and recurring problems concerning the integrity of Iowa's Marketable Title Act. The decision also casts doubts on all deeds issued by county officials for riparian lands along the Missouri River.

An unusual juxtaposition of facts, law and court decisions has complicated the ownership of the disputed land. The Congressionally authorized rechannelization of the Missouri River by the United States Corps of Engineers beginning in 1938-39 dredged well over a dozen new channels to divert the Missouri River into a designed channel in an effort to stabilize the river and promote navigation for the benefit and enjoyment of the public. To comprehend the magnitude of this project, it should be pointed out that the changed course of the Missouri River left 12,500 acres of Nebraska land east of, and 6,700 acres of Iowa land west of the 1943 boundary line. Report of Special Master, p. 37, *State of Nebraska v. State of Iowa,* 409 U. S. 285 (1972). The impact upon private titles to riparian lands bordering the rechannelization is immediately apparent. The novel, unsettled and important issues that result warrant further consideration by this Court.

Almost everyone concerned with land titles in the United States has come to realize that our basic legal framework for providing title security is an albatross. To eliminate the necessity of checking recorded transactions all the way back to the sovereign, an increasing number of states have turned to marketable title acts to stunt the growth of the albatross.

Marketable Title Acts are designed to extinguish old title defects automatically with the passage of time. The

Acts provide that if a person has an unbroken chain of title from the present back to his "root of title," then he has the sort of title in favor of which the extinguishment feature will operate. The Acts seek to avoid the constitutional problems of an outright extinguishment of property interests by providing that the holders of old interests and claims may preserve them by recording a notice of claim. Coulthard did not file a notice of his claim.

Therefore, the decision below represents a gross miscarriage of justice and a subtle erosion of statutory and legal principles. Left undisturbed, the Iowa Supreme Court decision will destroy public confidence in the sale of county owned land. Cancellation of record deeds in actions instigated by persons without standing will defeat the purpose of the Marketable Title Acts. Given the far-reaching implication this decision has on Marketable Title Acts and the widespread problem of private record titles created by the government rechannelization, the Petitioner respectfully submits that an important question of federal law is raised which has not been but should be settled by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Iowa Supreme Court.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF THE STATE OF IOWA

Filed June 30, 1976

Before MOORE, C. J. and LeGRAND, UHLENHOPP, REYNOLDSON and McCORMICK, JJ.

LeGRAND, J.

This is still another case involving disputed land title because of the vagaries of the Missouri River. The trial court quieted title in plaintiff, and we affirm.

Our review is de novo. Grosvenor v. Olson, 199 N. W. 2d 50, 51 (Iowa 1972). Defendant Clifford L. Simmons died during the pendency of this appeal. Helen H. Simmons is now the sole party defendant. Our references to plaintiff are to G. William Coulthard, who is also now deceased, rather than to the executor of his estate.

I. Plaintiff claims title to 1,060 acres of land located in Harrison County approximately two miles upstream from Blair Bridge between Missouri Valley, Iowa, and Blair, Nebraska. This area of the Missouri River was originally known as the California Bend. Since relocation of the channel by the United States Corps of Engineers, it has been called the California Cut-Off. In dispute are only 20 to 25 acres located in Lot 5, Section 12, Township 78 North, Range 46 West of the 5th P. M.

According to an 1858 governmental survey, the Missouri River was then running in a channel west of and contiguous to Lot 5. By 1879, Lot 5 had been washed

away by the Missouri River and lay entirely within the river itself. According to Stewart A. Smith, a surveyor called as a witness by both plaintiff and defendant, it had lost its identity as land.

Smith testified unequivocally that by 1930 any land existing where Lot 5 had formerly been was accretion land on the Nebraska side of the river. Sovereignty over such accretion land then vested in the state of Nebraska, and ownership vested in the owner of the riparian land to which it had accreted. State of Nebraska v. State of Iowa, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 2d 186, 187-188 (1892); Mather v. State, 200 N. W. 2d 498, 500 (Iowa 1972).

In 1938 and 1939 the Corps of Engineers dredged a new channel at California Bend. This is the channel now known as the California Cut-Off. In 1943, Iowa and Nebraska entered into a boundary compact under the terms of which the center line of the channel became the boundary between the two states. Under the compact, the disputed land came under the sovereignty and jurisdiction of the state of Iowa. See Iowa-Nebraska Boundary Compact, page lxxii, The Code, 1975.

II. Plaintiff claims title to the real estate under three separate theories. They are:

1. The land accreted to other land conveyed to him in 1959 by deed from Chicago & Northwestern Railway Company;

2. The land was conveyed to him by quit claim deed from Ralph Mencke; and

3. He has title to the land by adverse possession.

III. Defendant, on the other hand, lays claim to the land on two grounds:

1. It was conveyed to her in 1954 by quit claim deed from Harrison County; and

2. She has title by adverse possession.

IV. The decisive question is which of these claimants has established title by adverse possession. Although other grounds are stated by both, we believe the parties must stand or fall on the strength of their conflicting adverse possession claims.

To establish title by adverse possession, one must prove open, exclusive, continuous, actual and hostile possession under claim of right or color of title for at least 10 years. I-80 Assoc.'s, Inc. v. Chicago, R. I. & Pac. R. Co., 224 N. W. 2d 8, 10 (Iowa 1974); Grosvenor v. Olson, supra, 199 N. W. 2d at 51; Moffitt v. Future Assur. Assoc.'s, Inc., 258 Iowa 1160, 1170-1172, 140 N. W. 2d 108, 114 (supplemental opinion at 141 N. W. 2d 776 (1966)); Lawse v. Glaha, 253 Iowa 1040, 1046, 114 N. W. 2d 900, 903-904 (1962); Lynch v. Lynch, 239 Iowa 1245, 1254-1255, 34 N. W. 2d 485, 490 (1948).

Color of title and claim of right are alternatives and "either will suffice." See I-80 Assoc.'s, Inc. v. Chicago, R. I. & Pac. R. Co., supra, 224 N. W. 2d at 10. As we discuss later, both plaintiff and defendant meet the "claim of right or color of title" requirement. However, only plaintiff proved the other necessary element—open, exclusive, continuous, actual and hostile possession for at least ten years.

It is here that plaintiff succeeds and defendant fails.

V. We review first the evidence which convinces us plaintiff must prevail.

As already mentioned, plaintiff's case is based on possession under a claim of right. Concerning this matter, we quote from 3 Am. Jur. 2d, Adverse Possession, § 101, at 184-185 (1962):

> "It is not necessary to establish a claim of right • • • by an express declaration • • •; it is sufficient if • • • (claimant) has acted so as to clearly indicate he did claim title. • • • (It) need not be based on writing. • • • The actual occupation, use, and improvement of the premises by the claimant, as if he were in fact the owner thereof without payment of rent or recognition of title in another or disavowal of title in himself, will be sufficient to raise a presumption of his entry and holding as absolute owner and, unless rebutted, will establish the fact of a claim of right."

In the case now before us, plaintiff acted in a manner clearly asserting he claimed title. He cleared and improved the property. He used it without interruption as part of his farming operation. His conduct is consistent only with a claim of ownership. We believe this is shown by the following review of the evidence.

Beginning in 1938, one Maurice Cleaver leased land owned by the Chicago & Northwestern Railway Company. The Chicago & Northwestern Railway Company did not own, nor did the lease cover, the disputed land, which then

lay across the river in Nebraska. Although the dredging of the California Cut-Off in 1939 changed the location of this land, it was still separated from the leased land by a swale. In 1952, the action of the river had filled the swale and the land was then accessible to Cleaver. He began using it as part of his pasture land in that year and continued to do so through 1958, when he lost his lease because in 1959 the railroad company sold the leased land to plaintiff. During all this time, defendant, who had purchased land to the north of that leased by Cleaver, made no claim to the disputed tract in any manner.

In 1959, plaintiff and Delmar Chandler formed a partnership to work the land plaintiff had purchased from the railway company. This arrangement was still in effect at the time of trial in 1969. During this period, they continuously used the disputed tract for pasture land.

The land plaintiff purchased from the Chicago & Northwestern Railway Company was timberland, with willows, brush and large cottonwood trees growing wild. So was the adjacent disputed tract. Plaintiff cleared much of the land, including that now in dispute. Defendant Clifford L. Simmons, a bulldozer operator, participated in clearing land adjacent to the disputed tract, although it does not appear that he actually cleared the disputed land for plaintiff. By 1963, all timber and brush had been cleared from the area. During this four-year period while plaintiff was clearing and improving the property, defendant registered no protest against plaintiff's use of the land which defendant now claims.

We find the present case quite similar to Moffitt v. Future Assur. Assoc.'s, supra, 258 Iowa at 1160, 140 N. W. 2d at 108. There, as here, the property plaintiff claimed was not included in the conveyance by which he took title to adjoining land. There, as here, the other claimant held a quit claim deed from the county. There, as here, plaintiff and his predecessor had cleared, improved and farmed the land.

In finding for plaintiff in Moffitt we said:

> "'It is enough if the person pleading the statute takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition.'
>
> "• • •
>
> "Claim of right is distinct from claim under 'color of title.' We have said that claim of right or 'hostile claim' need not be under color of title.
>
> "The making of improvements on disputed • • • land • • • were acts characteristic of an owner rather than those of a mere licensee who owns adjoining property • • • and indicated occupancy under claim of right." (258 Iowa at 1171-1172, 140 N. W. 2d at 114)

See also Grosvenor v. Olson, supra, 199 N. W. 2d at 51.

We hold from a review of all the evidence that plaintiff has proven his title by clear and convincing proof of adverse possession. Plaintiff's possession had spanned 15 years—1952 to 1967—at the time the suit was started. In computing this period, we count Cleaver's possession from 1952 to 1958 as inuring to plaintiff's benefit. See Moffitt v. Future Assur. Assoc.'s, Inc., supra, 258 Iowa at 1171, 140 N. W. 2d at 114.

Having concluded plaintiff established title by adverse possession, we do not consider the other two bases upon which he relies and upon which the trial court also found in his favor.

VI. While the result reached in Division V necessarily means we find against defendant, we discuss the basis on which defendant claims the land.

Defendant first asserts title by virtue of a quit claim deed from Harrison County executed in 1954. Harrison County had purportedly acquired title by virtue of a tax deed from the county treasurer in 1938 for unpaid taxes from 1925 through 1934.

The trial court found the deed from the treasurer to the county was a nullity because during the years for which taxes were allegedly unpaid the real estate was located in Nebraska and was not subject to taxation in this state. Consequently, the deed from the county to defendants in 1954 conveyed no interest in the property. The record overwhelmingly supports this view, and we find against defendant on claim of title based upon this deed.

We have held, however, that such a deed, if taken in good faith, even though conveying no title, may form the necessary color of title to support a later claim of adverse possession. Grosvenor v. Olson, supra, 199 N. W. 2d at 52 and citations. However, this rule affords defendant no support because there is no proof of possession of the kind nor for the period necessary to establish adverse possession rights.

Defendant and her husband testified they were in possession of the land from and after 1953. Helen H. Simmons said that, begining in 1955 and continuing down to the time of trial, either she or members of her family went to the disputed tract at least twice yearly and posted signs reading "No trespassing—property of C. L. Simmons." This testimony was disputed by a score of witnesses. Like the trial court, we reject it.

Clifford L. Simmons also testified Cleaver's use of the property from 1952 to 1958 was with his permission. If so, of course, the use would never ripen into title by adverse possession. However, Simmons was unable to say when or under what circumstances this "permission" was given. Cleaver denied any such conversation. Simmons related, too, a conversation with Chandler in which he asserted ownership to the tract. Chandler denied such a conversation. A review of the evidence leads us to the conclusion no such conversations took place.

Defendant further claims the Chicago & Northwestern Railway Company and plaintiff both acknowledged her ownership of the disputed tract. The former is said to have done so by a pleading in a separate quiet title action brought by the railway company against Simmons. The trial court found, and we agree, that this amounted to no more than an allegation Simmons claimed title.

As to plaintiff's alleged concession of defendant's title, the evidence shows he negotiated with defendant in 1964 for the sale of land. If the sale had been completed, defendant was to have released any claim to the real estate now in dispute. We do not regard these negotiations as

an admission defendant owned the real estate. Plaintiff simply sought to buy his peace to avoid litigation. See 5 Thompson on Real Estate, § 2552, page 574 (1957); 3 Am. Jur. 2d, Adverse Possession, § 85, page 169 (1962); see also Annot. 125 A. L. R. 825.

We find the evidence does not support defendant on any of these factual matters relied on to defeat plaintiff's claim.

We find, too, defendant laid no claim to this land until 1967, when the evidence shows it was first posted. This was shortly before this quiet title suit. It appears that posting precipitated this suit.

There is not a shred of evidence to support defendant's claim of possession except the testimony of Mr. and Mrs. Simmons, and there is a wealth of evidence to refute them.

We find defendant has failed to produce any credible evidence to show open, exclusive, continuous, actual, and hostile possession for at least ten years or, in fact, for any period.

In connection with this matter, defendant asserts plaintiff is barred from prevailing because of the provisions of § 614.22, The Code. For present purposes the 1962 Code is applicable. It provides:

> "No action shall be maintained to set aside, cancel, annul, declare void or invalid, or to redeem from any tax deed, • • • which shall have been recorded in the office of the recorder of the county • • • prior to January 1, 1950, unless such action shall be commenced prior to January 1, 1963, and if no action to set aside, cancel, annul, declare void or invalid, or to redeem from any such deed shall be commenced prior to January 1, 1963, then such deed and all proceedings upon which the same is based shall be conclusively presumed to have been in all things valid and unimpeachable and effective to convey title according to the purport thereof, without exception • • •, *provided that this • • • shall not apply to any real property described in any such deed which is not on July 4, 1961, in the possession of those claiming title under such deed.*" (Emphasis supplied.)

Since we have already found defendant was not in possession of the land on July 4, 1961, this statute does not bar plaintiff's claim.

We have not overlooked the fact defendant has paid taxes on the land since 1954. While payment of taxes is a circumstance to be considered, it alone cannot establish title by adverse possession. In the present case, the payment of taxes by defendant, unaccompanied by other indicia of adverse possession is insufficient to defeat plaintiff's claim. Moffitt v. Future Assur. Assoc.'s, Inc., supra, 258 Iowa at 1172, 140 N. W. 2d at 113; *cf.* Grosvenor v. Olson, *supra,* 199 N. W. 2d at 52.

VII. For the reasons heretofore stated, the judgment is affirmed.

AFFIRMED.

APPENDIX B

PETITION FOR REHEARING TO THE IOWA SUPREME COURT

Filed July 12, 1976

COMES NOW, Helen H. Simmons, Appellant-Defendant, and respectfully petitions the Court for a Rehearing

of the above-captioned case, pursuant to Rule 350, Iowa Rules of Civil Procedure. Defendant sets out the following points of law and fact which the Court has overlooked or misapprehended in its decision adverse to the Defendant: (References are to G. William Coulthard, as Appellee-Plaintiff, rather than to his Executor).

1. The Court overlooked the legal effect of Coulthard's signed 1964 Purchase Offer to the Defendant offering to pay $100,000.00 for the land in dispute, Lot 5, Section 7-78-46, for other lands deeded to the Defendant in 1954 by Harrison County, and for 320 acres of land to the east of Lot 5 purchased by the Defendant from F. Pace Woods (Exhibit 34). *Litchfield v. Sewell,* 97 Iowa 247, 66 N. W. 104 (1896) states at pages 104-105:

> "It seems to be well settled that an offer by the defendant to purchase property, which he is holding adversely, from the plaintiff, within the statutory time, not made to settle any real or threatened litigation, *is clear recognition of plaintiff's title, and will interrupt the running of the statute.*" (Emphasis supplied.)

The Court stated that the 1964 Purchase Offer by Coulthard was not his admission that Defendant owned Lot 5 but that "Plaintiff simply sought to buy his peace to avoid litigation." This is error of fact. In 1964 Coulthard and the Defendant were not negotiating a settlement of any controversy or disputing Defendant's ownership of Lot 5 and other of Defendant's property which Coulthard offered to purchase, nor was there any real or threatened litigation regarding said lands. Coulthard's offer was a legitimate offer to purchase all of Defendant's land, and must be construed in accord with Iowa law as enunciated in *Litchfield, supra.* The Court's presumption that Coulthard

was trying to buy peace to avoid litigation is *not* supported by the evidence. Coulthard's Purchase Offer is his recognition of Defendant's title and ownership of the disputed land, removed the elements of hostile and continuous possession, and interrupted the running of Iowa's 10-year adverse possession statute of limitations in 1964, only 5 years after his deed to lands bordering Lot 5 on the east and south from the Chicago & Northwestern Railway Company was recorded in the Harrison County Recorder's Office at Book 476, Page 378, on November 12, 1959 (Exhibit 21). Therefore, the Court's decision that Coulthard owns the disputed land by adverse possession is erroneous, contrary to the law and the facts, and violates Defendant's property rights under Iowa law and the 14th Amendment to the United States Constitution.

2. The Court erred in finding that Coulthard owned the disputed land by adverse possession from "1952 to 1967 at the time suit was started." This is error of fact and law. This suit was filed on February 16, 1968 as Equity No. 21771, Harrison County District Court, Docket 72, Page 51. The Court states: "In computing this period, we count Cleaver's possession from 1952 to 1958 as inuring to Plaintiff's benefit." This is error of law. *Moffitt v. Future Assurance Associates,* 258 Iowa 1160, 150 N. W. 2d 108 (1966) states at 108-109:

> "Possession of *grantors claiming title* may be tacked onto possession of person claiming ownership by adverse possession. Possession of tenant is possession by claimant for adverse possession purposes. . . ."

Maurice Cleaver was *not* Coulthard's grantor; he was *not* Coulthard's tenant. *Cleaver was the tenant of the Railway*

Company. The Railway Company *never claimed the disputed land,* but *expressly disclaimed* any right, title or interest in said land in its action to quiet title: "Chicago & Northwestern Railway Co. v. Clifford and Helen Simmons, et al., Equity 20371, Harrison County District Court". In evidence by stipulation (Record, p. 40, ll. 5-15). In Paragraph X of its Petition in said case the Railway stated:

> "That the Defendants, Clifford L. Simmons and Helen H. Simmons, husband and wife, appear to be the record owners of Lot Three, Section Seven, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M. *and Lots Five* and Six in Section Thirteen, Township Seventy-eight, North, Range Forty-six, West of the 5th P. M. *which said tracts adjoin and are contiguous* to portions of the property described in Paragraph 1 . . . *but plaintiff states that it does not claim any right, title or interest in or to any of the real estate owned by any of said Defendants as set out in Paragraph X. . . .*"

By its *Amendment to Petition* (Exhibit 41 in the instant case) the Railway corrected "Section 13" to read "Section 12". This evidence was overlooked or misapprehended by the Court in its finding that the Railway Company's express disclaimer "amounted to no more than an allegation Simmons claimed title." (See Appellants' Brief, p. 35). The Railway's express disclaimer of any right, title or interest in Lot 5, the disputed land, proves conclusively that it was not claiming adverse possession of said land. Therefore, the alleged occupancy of the Railway's tenant, Cleaver, was not adverse possession by the Railway, Coulthard's grantor of lands adjoining Lot 5 on the east and the south, to which Coulthard could tack under Iowa law. The Court

has no legal authority to tack the alleged adverse possession of Coulthard to the alleged possession of Cleaver, *the Railway's tenant,* where the *Railway expressly disclaimed any right, title or interest in the disputed land.* The Court selected 1952 in computing Coulthard's alleged adverse possession, an error of fact. Cleaver testified (Record, p. 71, ll. 22-24):

> "*In 1955* I put in the other fence (dividing Lots 3 and 4, Section 7-78-45, east of the disputed land and owned by the Defendant and the Railway Company respectively in 1955) AND IT WASN'T UNTIL THEN I ACTUALLY PASTURED CATTLE IN THE AREA IN DISPUTE."

Cleaver's testimony refutes the Court's finding of adverse possession for 15 years between 1952-1967. The *Moffitt* case, *supra,* at page 109, states:

> ". . . It was incumbent on plaintiff claiming adjoining land by adverse possession to prove that he *intended* to claim to line including such property whether true line or not."

Coulthard's testimony proves that he did not have the necessary intention to claim the disputed land (Record, p. 89, ll. 6-17):

> "*I didn't know what government Lot 5 was* or WHERE IT WAS as I had no plat book. . . . I have learned since we commenced this that the Chicago Northwestern, *my predecessor in title, had disclaimed any ownership in Government Lot 5 in the quiet title action.*" (1959)

It is elementary that if Coulthard did not know what or where Lot 5 was, that he lacked the necessary intention to claim it adversely.

3. The Court erred in its decision that Coulthard owns the disputed land by adverse possession, under *Claim of right,* from 1952 to 1967, and in finding that Coulthard proved his title by *clear and convincing evidence. Goulding v. Shonquist,* 159 Iowa 647, 141 N. W. 24 (1913) defines the nature and requisites of claim of right and adverse possession at page 24:

> ". . . There must be some claim of right or title or interest in or to the property by which the possessor *in good faith* supposes he has a right to it, and under which he continues in possession, and which, when held openly for the *requisite length of time,* with *intention* of holding against the *true owner* and all others adversely, will ripen into a title."

Coulthard did not satisfy the 10 year statutory requirement for adverse possession under Iowa law. He bought land adjoining the disputed land on the east and south in 1959 from the Railroad. He interrupted any alleged adverse possession in 1964 with his Offer to Purchase the disputed land and other land from the Defendant, recognizing Defendant's record ownership of all said land under the holding in *Litchfield, supra,* after ONLY 5 YEARS of alleged possession. *Recognition of the Defendant's title is contrary to a claim of right in good faith.* Furthermore, Coulthard lacked the necessary intention to claim the disputed land against the "true owner" whom the Court did not identify. He testified that he did *not* know where Lot 5 was. The Court found that Coulthard cleared and improved the disputed land during a *four-year period* from 1959 to 1963, which is error of fact. Willie Schearer, bulldozer operator and Coulthard's witness, testified at Record, p. 127, ll. 29-32:

> *"I was in the area during the winter of '61 and '62 for four to six weeks. It didn't take too long to do this job."*

Since Coulthard had no claim of right to begin adverse possession his occupancy and tree-cutting were acts of a trespasser. He is in the same position as the defendant in *Goulding v. Shonquist, supra*:

> "Defendant who, WITHOUT CLAIM OF RIGHT, *cleared* up lands near his house, the *record title to which was in plaintiff* . . . knowing that he had no title or claim of right to enter into possession *so that his possession was not in good faith . . . and who never gave it in for taxation or offered to pay any of the taxes,* HAD ONLY A MERE OCCUPANCY, which although it extended over more than ten years, WOULD NOT RIPEN INTO TITLE OR CONSTITUTE A BAR UNDER THE STATUTE." (p. 24).

Like the defendant in *Goulding,* supra, Coulthard was "A MERE TRESPASSER IN ENTERING INTO POSSESSION AND HIS OCCUPANCY SINCE IS AS A TRESPASSER." (p. 25, cases cited). Furthermore, Defendant's record title to the disputed land from Harrison County by Deed in 1954 is recorded in the Harrison County Recorder's Office at Book 459, page 589, and constitutes constructive notice to Coulthard and all the world of her ownership and possession.

In February of 1968 Coulthard again interrupted the running of the adverse possession statute of limitations by starting this action against the Defendant and her husband, Clifford L. Simmons, deceased October 29, 1975. In February of 1968 the maximum time which Coulthard could count towards any alleged adverse possession (assuming he had color of title which he did not, and assuming that

he had not already stopped the running of the statute with his 1964 Purchase Offer which he did) WAS LESS THAN EIGHT AND ONE-HALF YEARS, *WHICH IS ONE AND ONE-HALF YEARS SHORT* of the statutory requirement (Section 614.1 (5)). (Coulthard's Deed from the Railway was filed in November of 1959.) As previously indicated Coulthard could not tack to the alleged possession of Cleaver, the Railway's tenant, since the Railway expressly disclaimed any right, title or interest in the disputed land.

Since Coulthard did not satisfy the 10 year Iowa requirement for adverse possession, he did not prove his claim to the disputed land on the *strength of his own title, a requisite under Section* 646.3, Code of Iowa. The burden of proof in this quiet title action is on Coulthard, NOT upon the Defendant. Any alleged weaknesses of the Defendant, therefore, cannot aid Coulthard who must succeed, if at all, on the strength of his own title (*Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 720 (1959) and *Jeffrey v. Grosvenor,* Iowa, 157 N. W. 2d 114 (1968)). The Defendant is the owner of record to the disputed land by her Deed from Harrison County in 1954, and has paid all the taxes on said land for 22 years, from 1954 to the present 1976. Coulthard paid no taxes on said land which is inconsistent with a claim of good faith. As record title owner Defendant is entitled to all the presumptions accorded other record owners by Iowa law which cannot discriminate against her. *Meyers v. Canutt,* 242 Iowa 692, 46 N. W. 2d 72 (1951) states at page 73:

> "The law presumes that possession of realty is under regular title, rather than by adverse possession."

Coulthard, unable to prove 10 years of adverse possession of the disputed land, recorded in the name of the Defendant on official Harrison County records, CANNOT OVERCOME THE ABOVE PRESUMPTION IN FAVOR OF THE DEFENDANT.

4. The Court erred in finding that the Defendant did not receive record title to the disputed land by virtue of Harrison County's Deed to her in 1954 and that "the deed from the county to defendants in 1954 conveyed no interest in the property." This is error of law and fact. The Court has overlooked and misapprehended the holding of the United States Supreme Court in *Hawkins v. Barney's Lessee,* 30 U. S. 457, 5 Pet. 457, 8 L. Ed. 190 (1831). *Hawkins* involved an interstate compact similar to the 1943 Compact between Iowa and Nebraska, and also involved statutes of limitation. *Hawkins* held that land ceded by one state to another state is subject to the laws and statutes of limitations of the latter. In the instant case, the disputed land which was part of Nebraska prior to the 1943 Iowa-Nebraska Compact, became subject to all of Iowa's laws of adverse possession, taxation, statutes of limitation, Marketable Title Act, etc., when it came under Iowa's jurisdiction in 1943.

Harrison County, Defendant's grantor, was record title owner of the disputed land in 1943 by virtue of a 1938 Treasurer's Deed or Tax Deed executed when the disputed land was part of Nebraska, said Tax Deed allegedly void according to this Court. *Chicago, R. I. & P. R. Co. v. Allfree,* 64 Iowa 500, 20 N. W. 779, 781 held that a void tax deed constitutes color of title upon which the statute of limitations may be invoked. (See also *McCash v. Penrod,*

131 Iowa 631, 109 N. W. 180, 181.) The Tax Deed therefore gave Harrison County color of title with which to begin adverse possession in 1943 against Eliza Mencke, Nebraska owner of the disputed land when it was in the State of Nebraska and described in said State as Tax Lot 9, Section 5, Township 18, Range 12, Washington County, Nebraska. Stewart Smith, Washington County, Nebraska, Surveyor, testified:

> "Tax Lot 9 was in the name of Eliza Mencke." (Record p. 41, ll. 3-7; See also Exhibit 1).

Eliza Mencke did not contest the adverse possession of Harrison County from 1943, date of the Iowa-Nebraska Compact, to 1954 when Harrison County sold the disputed land and other lands to Defendant and her husband at a Public Sale of County-Owned lands. It is well settled that title by adverse possession may be acquired by the United States, or by a state, county, city or other governmental entity (3 *Am. Jur.* 2d, 216, 225, "Adverse Possession", § 139; *O'Connor v. Sorensen,* 222 Iowa 1248, 271 N. W. 235, 238). By the year 1953 Harrison County had been in adverse possession against Eliza Mencke for the 10 year statutory period required by Iowa law. The title which Harrison County acquired by its adverse possession of the disputed land was a LEGAL TITLE IN FEE SIMPLE (*Meyers v. Canutt, supra,* p. 73). The 1954 sale by the County of the disputed land and other lands was publicly advertised as required by Iowa law. The Defendant and her husband were the only bidders, and paid the amount requested by the County. Harrison County's 1954 Deed to the Defendant, conveying the County's legal title in fee simple which was fully vested, was a valid act of the Board

of County Commissioners, and gave the Defendant LEGAL RECORD TITLE to the disputed land and other lands. Defendant's LEGAL RECORD TITLE is INDEPENDENT of Harrison County's 1938 Tax Deed and is record notice to the whole world of her ownership. The destruction of the Tax Deed by the Court CANNOT DESTROY DEFENDANT'S RECORD TITLE which is fully vested and which she received from Harrison County in 1954 after the County's 11 years of hostile, actual, open, exclusive and continuous adverse possession, under color of title, against Eliza Mencke and all the world. Harrison County's 1954 Deed to the Defendant was executed under full legal authority by duly constituted County officials, and was legally adequate to convey Record Title to the disputed land. The validity of said Deed and the Record Title conveyed by it is not subject to challenge, and neither the Trial Court nor the Iowa Supreme Court has legal authority to cancel it, since official acts of an official governmental body are entitled to full legal recognition by all branches of government in the State of Iowa. *School District of Soldier Township, Crawford County v. Moeller,* 247 Iowa 239, 73 N. W. 2d 43 (1955) holds:

> *"Acts of public officers are presumed regular and done with full authority."*

Independent School District of Danbury v. Christiansen, 242 Iowa 963, 49 N. W. 2d 263 (1951) holds:

> "The law presumes that public officers and boards do their duty and will not make a false certification."

Defendant's vested Record Title to the disputed land is a vested property right which is protected by the Equal Protection and Due Process clauses of the 14th Amend-

ment of the United States Constitution (16 *Am. Jur.* 2d, Constitutional Law 694, § 595). Harrison County's Deed to the Defendant conveying the disputed land stands on the same footing and is entitled to the same official recognition and legal protection as Harrison County's Deed conveying Lot 3, Section 7, Township 78, Range 45 to the Defendant. Said Lot 3 is located about one-half mile east of the disputed land on the high bank of the California Bend, was purchased at the same Public Sale as was said disputed land and other County owned lands, and Defendant's Deed to said Lot 3 was recorded on the same day in 1954 that her Deed to the disputed land was recorded. Defendant has paid all taxes levied against said disputed land for 22 years, 1954-1976. These taxes were accepted by all concerned governmental bodies, including the State of Iowa itself, and no governmental body has ever challenged the assessment, levying and payment of said taxes on the basis that Defendant's Record Title to said land was invalid or illegally issued. It is elementary that Coulthard, a private citizen, has no standing to challenge the validity of Defendant's Record Title to the disputed land, her Deed thereto a matter of official record for 22 years.

5. The Court erred in its finding that the Defendant does not own the disputed land by adverse possession:

"We find that defendant has failed to produce any credible evidence to show open, exclusive, continuous, actual and hostile possession for at least ten years or, in fact, for any period." This is error of fact and law. The Defendant has Record Title to the disputed land, and she is not required to prove title by adverse possession although she can do so. The Burden of Proof in this case is on Coulthard as Plaintiff who must prove on the strength of his own title, and by clear, convincing and satisfactory evidence, that his alleged title is superior to Defendant's Record Title. Coulthard cannot meet his burden, because he has failed to satisfy all the elements of adverse possession for the requisite 10 years.

Defendant's recorded 1954 Deed from Harrison County was constructive notice of her ownership and possession and constituted color of title for her to begin adverse possession. *Moffitt, supra,* pages 108-109, states:

> "Possession of grantors claiming title may be tacked onto possession of person claiming ownership by adverse possession."

Under the above authority Defendant can tack her adverse possession to that of Harrison County who in 1954 had 11 years of adverse possession against Eliza Mencke and all the world. By the time Coulthard arrived on the scene in November of 1959, Defendant could tack her 5 years of possession to Harrison County's 11 years of possession *for a total of 16 years.* By the time Coulthard began this suit in February of 1968, Defendant could tack her 14 years of possession to Harrison County's 11 years of possession *for a total of 25 years* of adverse possession. In the year 1964 when Coulthard made his Purchase Offer, recognizing Defendant's title to the disputed land, Defendant, INDEPENDENTLY OF HARRISON COUNTY'S ADVERSE POSSESSION, had *10 years* of adverse possession, fully satisfying the statutory requirements, and under Iowa law, LEGAL TITLE IN FEE SIMPLE to the disputed land vested in her. Defendant's payment of taxes, posting, fishing, hunting and her efforts to force a

roadway to the landlocked disputed land satisfied possession and dominion requirements of similar type land. (*Clear Lake Amusement Corporation v. Lewis,* 236 Iowa 132, 18 N. W. 2d 192, 195.) Defendant's ownership of legal title in fee simple vested after 10 years of adverse possession against Eliza Mencke, and was not overcome by Coulthard as shown by the evidence.

6. The Court erred in affirming the Trial Court's order declaring Harrison County's 1938 Tax Deed null and void and ordering its cancellation. The subject matter of the Tax Deed was not properly before the Court, since Coulthard lacked standing to have it declared void. Therefore, the Court had no jurisdiction to hear any evidence with regard to the Tax Deed, and its judgment declaring it void, is a nullity and without legal effect. 46 *Am. Jur.* 2d, Judgments, p. 329, § 24 states:

> "It is essential to the proper rendition of a judgment that the court have jurisdiction of the subject matter. *A judgment rendered without jurisdiction of the subject matter is void.* The operation of this rule is not affected by any judicial discretion possessed by the court. In order to confer jurisdiction on a court to render judgment, the subject matter must be presented for its consideration in some mode *sanctioned by law.*"

The mode sanctioned by Iowa law for an effective challenge to the validity of the 1938 Tax Deed to Harrison County, in order to bring it within the Court's jurisdiction, is set out by Iowa case law and statutes, none of which Coulthard complied with. *Minneapolis & St. L. R. Co. v. Pugh,* 201 Iowa 208, 205 N. W. 758 (1925) holds:

> "A party who had no title or interest in property sold for taxes cannot question title under the tax deed."

Coulthard had no title or interest in the disputed land and acquired none from Eliza Mencke, owner of said land when it was in the State of Nebraska or when it came under Iowa's jurisdiction by the 1943 Iowa-Nebraska Compact. From 1943 on the disputed land was subject to Iowa law (*Hawkins v. Barney's Lessee, supra*). *Section 448.7,* Code of Iowa, provides:

> "No person shall be permitted to question the title acquired by a treasurer's deed (tax deed) without first showing that he . . . had title to the property at the time of the sale . . . and that all taxes due upon the property have been paid by such person."

If Harrison County had no right to the disputed land by its 1938 Tax Deed, said land was subject to taxation in the State of Iowa from 1943 on. *Maxwell v. Palmer,* 73 Iowa 595, 35 N. W. 659, states:

> "Under this provision of the Code (Section 448.7), a plaintiff is not entitled to maintain an action to set aside tax deeds unless he has paid all the taxes due on the property, EVEN THOUGH HE CLAIMS THAT THE TAX DEEDS ARE VOID. . . ."

Courthard never paid any taxes on the disputed land. The Defendant paid all of the taxes due against the land for 22 years, 1954-1976. Harrison County's 1938 Tax Deed is protected by Iowa's Marketable Title Act, Sections 614.14 through 614.38, brought to the attention of the Court at page 19 of Defendant's Appellants' Brief. Under Section 614.17, judicially noticed under Rule 94, Iowa Rules of Civil Procedure, Coulthard was required to do certain acts before bringing this action and requesting the Tax Deed to be declared void. He was required to file a statement in writing in the Harrison County Recorder's Office set-

ting out the nature of his claim against the record title holder, whether such holder was Harrison County under its 1938 Tax Deed, or the Defendant under her 1954 Deed from Harrison County. The evidence shows that Coulthard never filed such a statement.

Additionally, Coulthard brought no action prior to January 1, 1963, to set aside Harrison County's Tax Deed as required by Section 614.22, hence the Tax Deed, under said Section, is conclusively presumed valid and unimpeachable. In summary, Coulthard had absolutely no standing whatsoever to attack the Tax Deed. While the validity of the 1938 Tax Deed is not essential to support Defendant's Record Title to the disputed land via Harrison County's 1954 Deed conveying legal title in fee simple to her, and via Defendant's own adverse possession of 25 years from 1943 to 1968, the date of this suit. Defendant is entitled to uniform application of the law and is entitled to all of the benefits conferred by Section 614.22, because of Coulthard's lack of standing to challenge Harrison County's Tax Deed, and because of the Trial Court's and the Supreme Court's lack of jurisdiction to rule upon the Tax Deed's validity. Neither Court has lawful authority to declare Harrison County's Tax Deed, void *sua sponte*.

7. The Court erred in its statement that "Stewart Smith testified unequivocally that by 1930 any land existing where Lot 5 had formerly been was accretion land on the Nebraska side of the river." This is error of fact. On page 39, lines 15-17, Record, Smith said:

> "It is possible that government Lot 5 NEVER WASHED AWAY, AND I DON'T KNOW FOR SURE."

Whether or not Lot 5 did or did not wash away may not be relevant in this case, since neither Coulthard nor Defendant claimed it while it was in Nebraska, and since said disputed land has been in place in Iowa since it came under Iowa's jurisdiction via the 1943 Nebraska-Iowa Compact, AND IT HAS NEVER WASHED AWAY SINCE THAT TIME.

8. The Court erred in its decision affirming the Trial Court's Judgment and Decree ordering the cancellation of the Defendant's 1954 Deed to the disputed land from Harrison County and denying Defendant's legal title in fee simple to said land by Harrison County's and her own adverse possession of said land, said legal title in fee simple being a fully vested property right under Iowa law. The facts, the law and the evidence do not support the Court's decision giving the disputed land owned by Defendant to Coulthard who failed to prove his claim of adverse possession of said land for the requisite 10 years. The Court's denial of Defendant's rights to the benefits and protection of Iowa property laws and statutes of limitations, particularly with regard to adverse possession, violates her rights to Equal Protection of the Laws, guaranteed by the 14th Amendment to the United States Constitution. The cancellation of Defendant's Record Title to the disputed land deprives her of her property without Due Process of Law, in violation of the 14th Amendment to the United States Constitution. In addition to the disputed land, Defendant's 1954 Deed from Harrison County also conveyed to her approximately 300 acres of riparian land along one mile of the Missouri River, a navigable stream under Federal law. The said 300 acres of riparian land is not the subject of this suit, but *is* the subject of a

quiet title action entitled "State of Iowa v. Harrison County, Clifford and Helen Simmons, et al.," Harrison County District Court, Equity No. 21276 filed in March 1965, but never tried. Blanket cancellation of Defendant's 1954 Deed will wipe out her vested Record Title to said 300 acres, and seriously cripple her long struggle to retain her ownership of said 300 acres against the claims of the State of Iowa. Clearly, such cancellation exceeds the lawful authority of the Court, and constitutes an unlawful deprivation of Defendant's property rights under the U. S. Constitution and under the Federal Civil Rights Act, 28 U. S. C. § 1343 and 42 U. S. C. § 1983.

WHEREFORE, Defendant prays the Court to rehear this case, reverse its decision and the Trial Court's decision, and quiet title to the disputed land in Defendant.

HELEN H. SIMMONS,
Petitioner-Defendant

BY: Truman Clare, Her Attorney,

/s/ Truman Clare

900 Nebraska Savings Building
Omaha, Nebraska 68102

State of Nebraska, County of Douglas, ss.

The undersigned, HELEN H. SIMMONS, being duly sworn, deposes and says that she is the Petitioner herein, has read the foregoing pleading filed on her behalf, and that the facts stated therein are true, as she verily believes.

/s/ Helen H. Simmons

SUBSCRIBED in my presence and sworn to before me by the said Helen H. Simmons, this 12th day of July, 1976.

/s/ Fred S. Pegler

Notary Public

APPENDIX C

ORDER OF THE IOWA SUPREME COURT DENYING PETITION FOR REHEARING

Filed July 26, 1976

Council Bluffs Savings Bank, Executor of the Estate of G. William Coulthard, Appellee vs. Clifford L. Simmons and Helen H. Simmons, Appellants, No. 55882.

The petition of the defendant-appellant, Helen H. Simmons, for a rehearing in the above entitled appeal has been duly considered and examined by the entire membership of the court and is now overruled and denied.

Done this 26th day of July, 1976.

/s/ C. Edwin Moore

Chief Justice—Iowa Supreme Court

APPENDIX D

SECTION 614.17, CODE OF IOWA, SPECIAL STATUTE OF LIMITATIONS AND PART OF IOWA'S MARKETABLE TITLE ACT

614.17 Claims to real estate antedating 1960

No action based upon any claim arising or existing prior to January 1, 1960, shall be maintained, either at law or in equity, in any court to recover any real estate in this state or to recover or establish any interest therein or

claim thereto, legal or equitable, against the holder of the record title to such real estate in possession, when such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate, since January 1, 1960, unless such claimant, by himself, or by his attorney or agent, or if he be a minor or under legal disability, by his guardian, trustee, or either parent shall within one year from and after July 1, 1970, file in the office of the recorder of deeds of the county wherein such real estate is situated, a statement in writing, which shall be duly acknowledged, definitely describing the real estate involved, the nature and extent of the right or interest claimed, and stating the facts upon which the same is based.

For the purposes of this and sections 614.18 to 614.20, inclusive, any person who holds title to real estate by will or descent from any person who held the title of record to such real estate at the date of his death or who holds title by decree or order of any court, or under any tax deed, trustee's, referee's, guardian's executor's, administrator's, receiver's, assignee's, master's in chancery, or sheriff's deed, shall be deemed to hold chain of title the same as though holding by direct conveyance.

For the purposes of this section, such possession of said real estate may be shown of record by affidavits showing such possession, and when said affidavits have been filed and recorded, it shall be the duty of the recorder to enter upon the margin of said record, a certificate to the effect that said affidavits were filed by the owner in possession, as named in said affidavits, or by his attorney in fact, as shown by the records and in like manner, such affidavits may be filed and recorded where any action was barred on any claim by this section as in force prior to July 1, 1970.

Amended by Acts 1951 (54 G. A.) ch. 209, § 3; Acts 1961 (59 G. A.) ch. 286, § 4; Acts 1970 (63 G. A.) ch. 1271, § 4.

APPENDIX E

SECTION 614.22, CODE OF IOWA, SPECIAL STATUTE OF LIMITATIONS AND PART OF IOWA'S MARKETABLE TITLE ACT.

614.22 Action affecting ancient deeds

No action shall be maintained to set aside, cancel, annul, declare void or invalid, or to redeem from any tax deed, guardian's deed, executor's deed, administrator's deed, receiver's deed, referee's deed, assignee's deed, sheriff's deed which shall have been recorded in the office of the recorder of the county or counties in this state in which the land described in such deed is situated prior to January 1, 1950, unless such action shall be commenced prior to January 1, 1963, and if no action to set aside, cancel, annul, declare void or invalid, or to redeem from any such deed shall be commenced prior to January 1, 1963, then such deed and all the proceedings upon which the same is based shall be conclusively presumed to have been in all things valid and unimpeachable and effective to convey title according to the purport thereof, without exception for infancy, mental illness, absence from the state, or other disability or cause; provided that this and section 614.23 shall not apply to any real property described in any such deed which is not on July 4, 1961, in the possession of those claiming title under such deed. (SS15, § 3447-d; C24, 27, 31, 35, 39, § 11029; C46, 50, 54, 58, 62 § 614.22).

APPENDIX F

PETITION—PARAGRAPH X

Filed June 19, 1959

Chicago and Northwestern Railway Company, A Corporation, Plaintiff, vs. Clifford L. Simmons, Helen H. Simmons, Maurice L. Cleaver, Harrison County, et al., Defendants

That the Defendants, Clifford L. Simmons and Helen H. Simmons, husband and wife, appear to be the record

owners of Lot Three, Section Seven, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M., and Lots Five and Six in Section Thirteen, Township Seventy-eight, North, Range Forty-six, West of the 5th P. M., which said tracts adjoin and are contiguous to portions of the property described in Paragraph One hereof; that the Defendants, Maurice L. Cleaver and Beatrice L. Cleaver, husband and wife, appear to be the record holders of certain real estate located in Section Thirteen, Township Seventy-eight, North, Range Forty-six, West of the 5th P. M. and in Section Eighteen, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M., which said tracts adjoin and are contiguous to portions of the property described in Paragraph One hereof; that the Defendants, Clarence Yager and Mary Ruth Yager, husband and wife, appear to be the record title holders of the real estate described as a part of the Southeast Quarter of the Northeast Quarter and Lots Five and Six in Section Eighteen, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M., which said tracts adjoin and are contiguous to portions of the property described in Paragraph One hereof; that the defendants, F. Pace Woods and Olive Black Woods, appear to be the record title holders of the real estate described as Northeast Quarter and the North half of the Southeast Quarter of Section Seven and the Northwest Quarter of Section Eight, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M., which said tracts adjoin and are contiguous to portions of the property described in Paragraph One hereof; that the Defendant, James Bertelson, appears to be the record title holder of the real estate described as Southeast Quarter of the Southeast Quarter of Section Seven and the Northeast

Quarter of the Northeast Quarter of Section Eighteen, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M., which said tracts adjoin and are contiguous to portions of the property described in Paragraph One hereof; that the Defendant, Harrison County, Iowa appears to be the record holder of the title to the real estate described as being located North of the Southeast Quarter of the Southeast Quarter of Section Twelve, Township Seventy-eight, North, Range Forty-six, West of the 5th P. M. and West of Lots Six, Seven and Eight of Section Seven, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M. and which is adjacent and contiguous to the property described in Paragraph One hereof; that the Defendants, Henry K. Peterson and Raymond G. Peterson appear to be the record holders of the title to the real estate described as Lots One and Two of Section Seven, Township Seventy-eight, North, Range Forty-five, West of the 5th P. M. which are adjacent and contiguous to Lots Seven and Eight in Township Seventy-eight, North, Range Forty-five, West of the 5th P. M. That because of the fact that the property lines of the plaintiff's property cannot be located and ascertained with certainty and portions thereof are not bounded by fences or monuments the plaintiff joins as defendants all of the persons who appear to hold title to real estate which adjoins and is contiguous to the property described in Paragraph One hereof, but plaintiff states that it does not claim any right, title or interest in or to any of the real estate owned by any of said Defendants as set out in Paragraph Ten, but avers that it is the owner of all of the tracts contiguous to that owned by the above named Defendants

as shown by the platting of said lots and the record of the County Auditor of Harrison County, Iowa.

DAVIS, HUBBNER, JOHNSON,
HERRING & BURT
Attorneys At Law
1115 Bankers Trust Building
Des Moines 9, Iowa

/s/ K. C. Acrea

K. C. Acrea
Attorney At Law
Missouri Valley, Iowa
ATTORNEYS FOR PLAINTIFF

APPENDIX G

AMENDMENT TO PETITION (Exhibit 41)

Filed July 20, 1959

Chicago and Northwestern Railway Company, A Corporation, Plaintiff, vs. Clifford L. Simmons and Helen H. Simmons, Husband and Wife, et al., Defendants.

Comes now the plaintiff and for its amendment to Paragraph Ten of the petition filed in this action states:

That the first sentence of said paragraph ten states among other things that the Defendants, Clifford L. Simmons and Helen H. Simmons, husband and wife, appear to be the record owners of Lots Five and Six in Section Thirteen, Township Seventy-eight North, Range Forty-six, West of the 5th P. M. That the section number as set out in Line four in said paragraph ten as being section thirteen is in error and that the plaintiffs hereby amend said

line four of paragraph ten by striking the word "Thirteen" from said line four and by inserting the word "Twelve" therein so that said paragraph is intended to and will read that the defendants, Clifford L. Simmons and wife, Helen H. Simmons are the owners of Lots Five and Six in Section Twelve, Township Seventy-eight, North, Range Forty-six, West of the 5th P. M.

Wherefore, the plaintiffs pray as in their original petition.

DAVIS, HUBBNER, JOHNSON
HERRING & BURT
Attorneys At Law
1115 Bankers Trust Building
Des Moines 9, Iowa

/s/ K. C. Acrea

K. C. Acrea
Attorney At Law
Missouri Valley, Iowa
ATTORNEYS FOR PLAINTIFF

APPENDIX H

IOWA-NEBRASKA BOUNDARY COMPROMISE

IOWA ACTS 1943 (50 G. A.) CH. 306

An Act to establish the boundary line between Iowa and Nebraska by agreement; to cede to Nebraska and to relinquish jurisdiction over lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska; to provide that the provisions of this Act become effective upon the enactment of a similar and reciprocal law by Nebraska and the approval of and consent to the compact thereby effected by the

Congress of the United States of America and to declare an emergency.

Be it enacted by the General Assembly of the State of Iowa:

SECTION 1. That on and after the enactment of a similar and reciprocal law by the State of Nebraska, and the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows:

Commencing at a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of the S. E. corner of said section, and running thence northwesterly to a point on the south line of lot 4 of section 10, in township 15 N., of range 13 E. of the sixth principal meridian, 2,275 feet east of the S. W. corner of the N. W. ¼ of the S. E. ¼ of said section 10; thence northerly, to a point on the north line of lot 4 aforesaid, 2,068 feet east of the center line of said section 10; thence north, to a point on the north line of section 10, 2,068 feet east of the quarter section corner on the north line of said section 10; thence northerly, to a point 312 feet west of the S. E. corner of lot 1, in section 3, township 15 N., range 13 E., aforesaid; thence northerly, to a point on the section line between sections 2 and 3, 358 feet south of the quarter section corner on said line; thence northeasterly, to the center of the S. E. ¼ of the N. W. ¼ of section 2 aforesaid; thence east, to the center of the W. ½ of lot 5, otherwise described as the S. W. ¼ of the N. W. ¼ of section 1, in township 15, range 13, aforesaid; thence southeasterly, to a point on the south line of lot 5 aforesaid, 1,540 feet west of the center of section 1. last aforesaid; thence south 2,050 feet, to a point 1,540 feet west of the north and south open line through said section 1; thence southwesterly, to the S. W. corner of the N. E. ¼ of the S. W. ¼ of section 21, in township 75 N., range 44 W. of the fifth principal meridian; thence southeasterly, to a point 660 feet south of the N. E. corner of the N. W. ¼ of the N. E. ¼ of section 28, in township 75 N., range 44 W., aforesaid; and said line produced to the center of the channel of the Missouri river; thence up the middle of the main channel of the Missouri river to a point opposite the middle of the main channel of the Big Sioux river.

Commencing again at the point of beginning first named, namely, a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of S. E. corner of said section, and running thence southeasterly to a point 660 feet east of the S. W. corner of the N. W. ¼ of the N. W. ¼ of section 28, in township 75 N., range 44 W. of the fifth principal meridian, and said line produced to the center of the channel of the Missouri river; thence down the middle of the main channel of the Missouri river to the northern boundary of the State of Missouri.

The said middle of the main channel of the Missouri river referred to in this act shall be the center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri river from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4 inclusive, dated January 30, 1940, and file numbers AP-5 to 10 inclusive, dated March 29, 1940, which maps are now on file in the United

States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the secretary of state of the State of Iowa and with the secretary of state of the State of Nebraska.

SEC. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

SEC. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

SEC. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

SEC. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law

shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska.

SEC. 6. Whereas an emergency exists, this act shall be in full force and effect, subject to conditions as hereinabove expressed from and after its publication in the Sioux City Journal, a newspaper published at Sioux City, Iowa, and in the Nonpareil, a newspaper published at Council Bluffs, Iowa.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 1976, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Michael Murray, 110 North Second Avenue, Logan, Iowa, 51546, Counsel for the Respondent. I further certify that all parties required to be served have been served.

/s/ Truman Clare

TRUMAN CLARE of the firm of
MARKS, CLARE, HOPKINS & RAUTH
900 Nebraska Savings Building
Omaha, Nebraska 68102
Counsel for Petitioner

In The

Supreme Court of the United States

October Term, 1976

No. 76-547

HELEN H. SIMMONS,

Petitioner,

vs.

COUNCIL BLUFFS SAVINGS BANK, EXECUTOR OF THE ESTATE OF G. WILLIAM COULTHARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL MURRAY
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COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TEXTS CITED

BOUNDARY COMPACT

In The

Supreme Court of the United States

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HELEN H. SIMMONS,

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COUNCIL BLUFFS SAVINGS BANK, EXECUTOR OF THE ESTATE OF G. WILLIAM COULTHARD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Council Bluffs Savings Bank, Executor of the Estate of G. William Coulthard, respectfully prays that the Petitioner's Petition for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of the State of Iowa dated June 30, 1976, be dismissed and denied.

RESPONDENT'S SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

Under a sub-heading entitled "History of Disputed Land" commencing at page 10 of her Petition, the Petitioner purports to relate the facts out of which grew the case entitled *G. William Coulthard, Plaintiff v. Clifford L. Simmons and Helen H. Simmons, Defendants,* Equity No. 21771 in the District Court of Harrison County, Iowa. This so-called "History of Disputed Land" is incomplete and inaccurate to an extent that Respondent believes correction and supplementation are in order as follows:

Contrary to the statements made in numbered paragraph 2 on page 11, the undisputed and unchallenged documentary evidence presented to the trial court and certified on appeal to the Iowa Supreme Court told the story of where the main channel of the Missouri River was during the period of time prior to the winter of 1938-1939. This evidence clearly shows that between 1858 and about 1890, the main channel moved gradually southeasterly, washing away and destroying all of the land along its left (Iowa) bank. The maps of that era clearly show that in that movement, all of Government Lot 5 was washed away and destroyed and its identity was destroyed. Also, Mr. Stuart Smith, the expert surveyor witness who was called by both parties and whose testimony stands without contradiction, testified that in his opinion, Government Lot 5 was washed away and destroyed sometime before 1879.

Behind this southeasterly movement of the channel, accretion land formed to the river's right (Nebraska) bank. By about 1890, accretion land had formed in Nebraska completely occupying the same spot under the sky where

Government Lot 5 in Iowa had formerly been. This newly formed land was factually and legally in Nebraska because at that time, the Iowa-Nebraska State Boundary was the thalweg of the Missouri River, per the "rule of the thalweg" laid down by this Court in *Nebraska v. Iowa,* (1892) 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186. That is to say, the state boundary moved southeasterly with the thalweg between 1858 and 1890, and as it passed over and across the spot under the sky where Government Lot 5 had been, that spot came under the sovereignty and jurisdiction of Nebraska.

The undisputed documentary evidence is that the main channel of the river continued to flow in the channel southeasterly from the disputed land, and the newly formed accretion land continued to exist in Nebraska in the former location of Government Lot 5 (as part of a much larger tract of accretion land) until the U. S. Army Corps of Engineers diverted it into the California Cutoff canal during the winter of 1938-1939.

The undisputed testimony in the trial court was that one Henry Mencke of Blair, Nebraska, adversely, openly and peaceably possessed the disputed land in Nebraska from 1926 through 1938, used it in his farming operations, claiming it as accretions to his Nebraska high bank land contiguous on the West.

As mentioned hereinabove, the Corps of Engineers dredged a canal and diverted the main channel of the Missouri River into it during the winter of 1938-1939. This canal was for the purpose of cutting off the large horseshoe bend of the river which had been known as California Bend, and the new canal channel naturally was known as California Cutoff.

Although the Corps of Engineers shifted the thalweg from the old natural channel southeasterly from the disputed land to the new canal channel west of the disputed land in 1938-1939, the disputed land remained in Nebraska, subject to Nebraska sovereignty and jurisdiction, because the shift of the thalweg was a man-made avulsion, and the Iowa-Nebraska Boundary Line therefore remained in the abandoned channel of California Bend. The eyewitness testimony and the aerial pictures of 1938 and 1939 from the files of the Corps of Engineers are undisputed and conclusive that the Nebraska land which was in the concave side of California Bend, and which included the disputed land, was not washed away or destroyed when the thalweg was shifted from one side of it to the other.

In numbered paragraph 3 on page 11, the Petitioner relates that a tax deed was issued in May, 1938, from the Treasurer of Harrison County, Iowa, to Harrison County, Iowa, "which included lands in Harrison County east of the California Cutoff . . .". Petitioner seeks to obfuscate what really happened. Her inference is that this tax deed conveyed the disputed land. In truth and in fact, the tax deed purported to convey old Government Lot 5, the land that had been washed away and destroyed and its identity destroyed back before 1879.

Petitioner refuses to acknowledge the concept that the disputed land is not Government Lot 5; that it is newly formed accretion land which, as of May, 1938, was west of the Missouri River (the California Cutoff canal hadn't even been dredged yet), in the State of Nebraska, subject to the sovereignty and laws of Nebraska, and in the peaceable possession of a Nebraskan. There is no way that the

Treasurer of Harrison County, Iowa could be conveying the disputed land to anybody in May of 1938.

Not until 1943 did Iowa gain sovereignty over the disputed land by operation of the 1943 Iowa-Nebraska Boundary Compact (Appendix H attached to Petitioner's Petition), particularly Sections 2 and 3 of the Nebraska enactment. The Compact fixed the state boundary as the center line of the California Cutoff canal, and Nebraska ceded to Iowa all lands formerly in Nebraska but lying easterly of said boundary.

For the first several years after the disputed land was severed from the main part of the Mencke farm by the main channel of the Missouri River flowing down through the Cutoff canal, Henry Mencke continued to possess it and use it in his farming operations by barging things to and from it across the river. Until about 1954, nobody tried to use or possess it from the Iowa side because an impenetrable swamp existed in the abandoned channel where the pre-1939 main channel had been.

Henry Mencke conveyed the disputed land to his son, Ralph Mencke, in 1947, and Ralph Mencke later conveyed to G. William Coulthard, so that Respondent is now the owner and holder of the Mencke title.

The great flood of the Missouri River which occurred in 1952 caused silt and sand to be deposited in the swamp which had theretofore made the disputed land inaccessible from the Iowa side. One Maurice Cleaver, who rented all of the land in that vicinity owned by the C & NW Railway Co., thinking the disputed land was covered by his lease, started using the disputed land in his farming opera-

tion as pasture for his cattle. In 1954, there was an unfenced segment of boundary line between the C & NW Ry. Co. land on the south and the C. L. and Helen H. Simmons land on the north. This gap was northeasterly from the disputed land and adjacent to the pasture where the Cleaver cattle were, and the cattle estrayed from the pasture to the Simmons farm. To stop this estraying, Mr. Cleaver decided to build a fence in the gap. He first invited Mr. Simmons to take part in the project by building one-half of the necessary fence, all in accordance with the Iowa law regarding boundary line fences. Mr. Simmons declined the invitation but said he had no objection if Mr. Cleaver would build the fence as a project of his own.

Mr. Cleaver built the fence. It enclosed the disputed land within the boundary fences of the C & NW Ry. Co. farm, purchased by Mr. Coulthard in 1959, and it has been continuously within the boundary fences of the Coulthard farm until today. The railway company, through its tenant Mr. Cleaver, and G. William Coulthard personally and through his tenant, Delmar Chandler, were in peaceable, open, continuous and adverse possession of the disputed land from 1954 until 1967. Nobody disturbed their possession or challenged their right to possession until 1967, when Petitioner twice cut the boundary fence which Mr. Cleaver had built, thus precipitating the commencement of Mr. Coulthard's case to quiet his title.

As Petitioner relates at page 14 of her Petition, Mr. Coulthard cleared the disputed land in 1961-1962. Figuratively speaking, Mr. and Mrs. Simmons watched from across the fence silently, without any objection. That is to say, the Respondent made valuable improvements, and

even this didn't trigger any claim of ownership by the Simmonses.

The Petitioner claims in paragraph No. 8 on page 12 that the C & NW Railway Co. disclaimed ownership of the disputed land in 1959 in a then pending quiet title case. This is not possible in view of the fact that the disputed land was never involved in the case. Also, we must constantly keep in mind that Government Lot 5 went out of existence forever sometime prior to 1879. And finally, as the Iowa Supreme Court stated in its opinion, the railway company's allegation was not a disclaimer, but only an allegation that Simmons claimed title. (See page 35 of Appendix A attached to Petitioner's Petition.)

The Petitioner relates in paragraph No. 11 on page 14 that Mr. Coulthard acknowledged her title to the disputed land in 1964 by offering to buy it. Actually, the evidence establishes that he was offering to buy them out entirely and totally in that area; and for his offered price, he expected to get not only everything the Simmonses owned, but also everything they claimed, in the area. The Iowa Supreme Court correctly rejected this claim, citing the following authorities: 5 Thompson on Real Estate, Sec. 2552, page 574 (1957); 3 Am. Jur. 2d, Adverse Possession, Sec. 85, page 169 (1962); see also Annot. 125 A. L. R. 825. (See pages 35 and 36 of Appendix A attached to Petitioner's Petition.)

In paragraph No. 7 on page 12, the Petitioner claims that she has paid all of the taxes levied and assessed against Lots 1, 2, 3, 4 and 5, "including the disputed land" since 1954. This is just another instance of her refusal to

acknowledge the fact that Lot 5 was washed away and destroyed sometime before 1879, and the disputed land cannot be described or taxed as "Lot 5" because the disputed land is newly formed accretion land, formed in Nebraska and ceded to Iowa by the 1943 Boundary Compact.

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RESPONSE TO PETITIONER'S "REASONS FOR GRANTING THE WRIT" AND ARGUMENT

Petitioner's Reason No. 1 commencing on page 20 of her Petition is an allegation that the Supreme Court of Iowa arbitrarily and capriciously cancelled two quitclaim deeds which the Simmonses received from Harrison County in 1954 and 1965. Her particular complaint at this point is that the case entitled *Coulthard v. Simmons,* which was then before the court, only involved 25 acres of the 300 or more acres of land which were quitclaimed to her by the deeds. It is her misconstruction of the decision and opinion of the Supreme Court of Iowa that the court not only cancelled the deeds as to the 25 acres over which it had jurisdiction in the case, but also as the whole 300 acres or more.

There is nothing in the Iowa Supreme Court's decision or opinion (or in the trial court's judgment and decree) indicating any intention to affect the title to any land other than that over which it had jurisdiction. There is no reason to presume that the Iowa Supreme Court was attempting to wrongfully exceed or enlarge its jurisdiction.

The case entitled *Coulthard v. Simmons* was a quiet title case. Coulthard prayed that his title be quieted and

that any and all deeds clouding his title to the land particularly described in his Petition be nullified and voided. In deciding the case for Coulthard, and in order to grant him the effective relief for which he had prayed, the Iowa courts could do no less than nullify the Simmons' quitclaim deeds insofar as they constituted clouds on the Coulthard title to the 25 acres. It would have been superfluous to say that the operation of the decision was limited to the 25 acres over which the court had jurisdiction. It was elementary that the court couldn't offect the operation or non-operation of the deeds on any other land in any event.

It simply is not true that the decision of the Iowa Supreme Court in this case constitutes giving the State of Iowa a "windfall of approximately 300 acres of Simmons' land". Ownership of said 300 acres is the issue to be decided in the case of *State of Iowa v. Harrison County, Simmons, Coulthard, et al.,* now pending in the District Court of Harrison County, Iowa. Nobody has asserted in that case that the Iowa Supreme Court's decision in *Coulthard v. Simmons* is res adjudicata because it is not res adjudicata.

Petitioner says that the decision of the Supreme Court of Iowa conflicts with "a host of decisions" by this court. *Hanson v. Denckla,* 357 U. S. 235, 250 (1958) is cited but it is not in point. Respondent hasn't been able to discover any such conflicting decisions and believes there are none.

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In Petitioner's Reason No. 2 commencing on page 21 of her Petition, she asserts that the Iowa Supreme Court evaded constitutional issues raised by her. There was no such evasion. It inheres in the decision that every constitutional issue raised by her was decided against her. It is immaterial that the Iowa Supreme Court elected not to write about the constitutional issues in its opinion. Petitioner did not raise any constitutional issues in the trial court, thus indicating that she herself held the constitutional issues in low esteem until they became her only hope of one more appeal.

She also asserts that the Iowa Supreme Court's decision was "shockingly wrong" and "totally devoid of evidentiary support".

The decision is not shockingly wrong. On the contrary, it is a good faith effort on the part of the Iowa courts to apply, interpret and construe the 1943 Iowa-Nebraska Boundary Compact in accordance with its terms and spirit. By Section 2 of the Nebraska enactment of the Compact, Nebraska ceded to Iowa jurisdiction over much land, including the disputed land in this case. By Section 3 of the Iowa enactment, Iowa (including Iowa's courts) agreed that all titles to ceded lands that had been "good in Nebraska shall be good in Iowa". To award title to the d i s p u t e d land to anybody other than Mr. Coulthard, the owner and holder of the Mencke (Nebraska) title would have been a clear violation of the Boundary Compact. It would also have been disobedience to this Court's directions in *Nebraska v. Iowa,* 409 U. S. 285 (1972).

By Iowa appellate rules, an appeal in an equity case to the Iowa Supreme Court is triable de novo. This requires the Supreme Court to examine the Record on Appeal in equity cases with particular care. Reading of Justice LeGrand's opinion is convincing that this Record on Appeal was examined with particular care, and that the facts found are amply supported by good and competent evidence.

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In Petitioner's Reason No. 3 commencing on page 23 of her Petition, she argues that because Coulthard "had no standing" to attack the tax deeds and quit claim deeds on which her claim of title depended, the Iowa Supreme Court had no jurisdiction of the subject matter, and that the Supreme Court's decision and opinion are therefore void. Her theory is that Iowa Code Section 614.22 guarded her tax title and stripped Coulthard of "standing" to attack it.

The fatal defect in Petitioner's claim at this point was pointed out by the Iowa Supreme Court in its opinion by simply quoting from the statute itself. (See pages 36 and 37 of Appendix A attached to Petitioner's Petition.) In order for a claimant to have the protection of Section 614.22, he or she must first establish that he or she had possession of the disputed property on July 4, 1961. There is not a scintilla of evidence that the Simmonses ever had possession of the disputed property. As a matter of fact, Mrs. Simmons relates in her own statement of facts that it was in 1961-62 that Mr. Coulthard caused the disputed

land to be cleared for farming (Petition, par. 10 on page 14).

Failing to establish actual possession, which the statute obviously requires, Petitioner next theorizes that she had "constructive possession" because she was the "record titleholder". The trouble with this theory is that she was not the record titleholder either. She held record title to nothing; Government Lot 5, the land described in her quitclaim deeds, had been washed away and destroyed and its identity destroyed sometime before 1879; the disputed land is not Government Lot 5 or any part thereof; the disputed land is a tract of land created by accretion in the State of Nebraska in about 1890, and ceded to Iowa by operation of the 1943 Iowa-Nebraska Boundary Compact. *Tyson v. State of Iowa,* 283 F. 2d 802 (1960); *Wilcox v. Pinney,* 250 Iowa 1378, 98 N. W. 2d 720 (1959).

The next theory advanced by the Petitioner in Reason No. 3 is based on Iowa Code Section 448.7. Her claim is that Coulthard had no standing to attack the 1938 tax deed, upon which her claim to the disputed land is based, because he had not paid all taxes due upon the property. Her theory and claim at this point are invalid for at least two reasons: First, the Iowa Supreme Court has consistently held that Code Section 448.7 does not apply where the tax deed under attack is void, as distinguished from merely defective or voidable. *Inter-Ocean Reinsurance Co. v. Bartleson,* 234 Iowa 335, 11 N. W. 2d 688 (1943); *Thompson v. Chambers,* 229 Iowa 1265, 296 N. W. 380 (1941); *Jordan v. Beeson,* 225 Iowa 460, 280 N. W. 625 (1938). In other words, Code Section 448.7 cannot be used or construed to "make a silk purse out of a sow's ear." The 1938 tax deed from the Harrison County

Treasurer to Harrison County was void, not merely defective or voidable, for reasons hereinbefore mentioned: There was no such land in existence in 1938; the land the deed purported to convey had been washed away and destroyed; the new land which had formed in the same spot under the sky was as of 1938 and had been for more than 40 years in the State of Nebraska, not subject to being taxed in Iowa, not subject to being sold for non-payment of Iowa taxes, not subject to Iowa sovereignty or jurisdiction in any manner whatsoever. Second, no taxes have ever been levied or assessed upon the disputed land in Iowa. The county officials may have been trying to tax the disputed land by taxing Government Lot 5, but the disputed land is not Government Lot 5: hence, there have been no taxes for the Respondent to pay.

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In Petitioner's Reason No. 4 commencing on page 26 of her Petition, she argues that the decision of the Supreme Court of Iowa in *Coulthard v. Simmons* casts a cloud over all deeds issued by counties which purport to convey riparian lands along the Missouri River.

Respondent's response to that argument is that any quitclaim deed issued by a county (and that is the only kind of deed that can be issued by an Iowa county), should be taken by the grantee with his eyes wide open. Caveat emptor should be the rule. The Iowa law is and always has been that the county makes no representation that it owns or has any interest in the land which it purports to convey by quitclaim deed; there is no representation that the land even exists. In other words, caveat emptor not

only should be the rule; it is and always has been the rule. *Bremhorst v. Coal Company,* 202 Iowa 1251, 211 N. W. 898 (1927).

Marketable Title Acts should not be permitted to perform miracles. They cannot be construed to create title or ownership where none existed before. They should not be interpreted so as to resurrect land long since washed away, destroyed and its identity destroyed.

The record in the trial court and in the Supreme Court of Iowa shows that the Simmonses gambled by paying $341.70 to Harrison County in 1954. They acquired whatever claim the county had to 189.63 acres of land, an average price of $1.80 per acre. They knew or should have known from the cheapness alone that there was something wrong about the transaction. There was something wrong! Harrison County didn't own or have any interest in the property being sold. The property didn't even exist. It had been washed away more than 75 years before. Mr. and Mrs. Simmons, blinded by their desire to get this bargain, forgot all about caveat emptor, ignored the time honored rule of "buyer beware". Now, Mrs. Simmons asks this court to retrieve her chestnuts from the fire; it should not be done for her.

Petitioner would lead this court to believe that many tax deeds like the one here involved or similar to it are in existence up and down the Missouri River, being relied upon by many people as muniments of title. She asserts that if the Iowa Supreme Court's decision is permitted to stand, all such deeds will be jeopardized, and confusion will reign.

In truth and in fact, very few tax deeds bearing any similarity to the 1938 tax deed involved here were ever issued. The detailed facts of this case are unique and perhaps singular. There will not be any great upheaval along the Missouri River caused by the Iowa Supreme Court's decision of *Coulthard v. Simmons.* The decision is just, equitable, fair and correct and it should not be subjected to further review by Writ of Certiorari.

CONCLUSION

For the reasons set forth hereinabove, the Respondent respectfully prays that the Petition for a Writ of Certiorari herein be dismissed and denied.

Respectfully submitted,

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